SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,
Petitioner,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
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BRIEF FOR RESPONDENT

Questions Presented

1. Should this Court hold that an official wiretap interception of a telephone conversation is within the regulatory ambit of the Fourth Amendment where the interception does not involve physical contact with or electronic penetration of a place or structure in which a party to the conversation is located?

2. Even if it be assumed that such a wiretap interception of a telephone conversation is a search and seizure within the meaning of the Fourth Amendment, can petitioner invoke the provisions of that Amendment where his telephone conversations were conducted with a co-conspirator located in a public bar at a telephone that was not enclosed by a telephone booth and on a telephone line which had an extension and two portable telephone instruments?

3. Even assuming that such official wiretapping is within the governance of the Fourth Amendment, enforceable against the states through the Fourteenth Amendment, should this Court hold that the use of wiretap evidence herein was violative of Fourth Amendment standards?

4. Can petitioner rely upon Section 605 of the Federal Communications Act as a vehicle of protection where that section has been repealed by the federal Safe Streets Act, or was Section 605 abated and made inoperative by such repeal and rendered unavailable as a ground of relief?

5. Even if it be assumed that Fourth Amendment standards govern the use in a state criminal trial of wiretap evidence such as that involved in this case, should this Court give retroactive application to its decisions in the *Berger* and *Katz* cases so as to invalidate the judgment of conviction in this case? And assuming Section 605 did not abate, should the Court give retroactive application to its decision in *Lee* v. *Florida* so as to reverse the judgment of conviction herein?

6. Does the First, Fifth or Ninth Amendment or the due process clause of the Fourteenth Amendment protect a right of telephonic privacy, did the use of the wiretap evidence herein violate such a right, and, assuming, *arguendo,* and contrary to fact, that it did, is such a violation ground for reversal of the judgment of conviction herein?

7. Is petitioner's contention that the trial prosecutor erred in referring to petitioner's inculpatory recorded telephone conversations as confessions a mere terminological quibble in view of the dramatically incriminatory nature of those conversations and can the prosecutor's references be said to constitute official behavior so shocking to the civilized sense of justice that it falls below the minimum standard of due process and amounts to a deprivation of substantial rights so serious as properly to invoke the majestic processes of our high constitutional court?

Preliminary Statement

In the Court below and in the Brief in opposition to the petition for a Writ of Certiorari in this Court, The People of the State of New York have been represented by the District Attorney of Nassau County with Assistant District Attorney Henry P. De Vine, of counsel. In this Brief, Assistant District Attorneys George D. Levine and Henry P. De Vine appear of counsel. The Statement of the Case in this Brief was written by Assistant District Attorney Henry P. De Vine. Section C of Point II in this Brief was written by Assistant District Attorneys George D. Levine and Henry P. De Vine. The remainder of this Brief, including Sections A and B of Point II and all of Point I and Points III through X, were conceived and written by Assistant District Attorney George D. Levine.

Statement of the Case

The Evidence

Sometime in 1958, Joey Gallo, an infamous Brooklyn gang leader tried to extort a substantial sum of money from Irving Holzman (1496; 1502). Holzman (1016, *et seq.*) had in his employ at the time one Joseph Albino who was the long time friend of Rocky Graziano, the prize fighter. Albino volunteered that if Holzman contacted Rocky Graziano the matter might be resolved. Holzman did just that and Graziano recommended that Salvatore Granello, a/k/a Sally Burns, was the man who could settle the controversy. Holzman thus meets Granello for the first time.

Sure enough, just as Albino predicted, the Gallos were called off whereupon Granello then announced that Holzman owed him $3,500 for his efforts.

According to Holzman (1502, *et seq.*), he gladly paid the $3,500 without complaining to the authorities out of fear for the Gallos. How the $3,500 was divided up between Granello and the Gallos remains one of the mysteries of the decade.

In point of time, the next significant event occurred in 1963 when the appellant, Thomas R. Kaiser, purchased a bar and grill in the Jamaica-Richmond Hill area in connection with which he borrowed a sum of money from Holzman who owned the juke box and shuffle board then in the premises. In return for the loan, Kaiser signed a contract with Holzman, continuing the Holzman machines in the newly purchased bar.

The contact with Holzman was made by Kaiser through Robert Luttman, an employee of Holzman, and the arrangement was typical of those prevailing in the coin machine industry in Metropolitan New York (999-100).

Kaiser, admittedly was a long time friend of Dino Conte, who managed or hung out in the Headline Lounge on 43rd Street in Manhattan. It was Conte who introduced Kaiser to Granello in April of 1964 at the Headline Bar. According to Kaiser, he knew Granello as Sally Burns (1887).

In May of 1964, Conte brought up Holzman's name in a conversation and quizzed Kaiser regarding Holzman's private life, his business ventures, partners, the extent of his business holding and enterprises, as well as Holzman's overall financial condition (1916-17).

Kaiser maintained that he knew nothing then about Holzman personally or his private business (1901-1903).

The record (*supra*) is quite clear that as a result of this conversation with Conte and probably at Conte's urgings, Kaiser used his friendship with Robert Luttman, Holzman's trusted employee, to ferret out the information clearly proving that Irving Holzman by 1964 possessed a very substantial investment in the coin machine industry in the greater New York area. The result of the Kaiser probings established that Holzman was a man of very considerable means. Indeed, Holzman was now placed in the million dollar class by the conspirators.

Kaiser frankly conceded he knew Granello was then contacting Holzman (1922), although he steadfastly denied that he had guilty knowledge that Granello and Conte were using the intelligence gained by Kaiser from Luttman and passed by Kaiser to Conte, to extort $25,000 for the "family" and 25% of Holzman's business for themselves.

The Corpus Delicti

For the reason that Kaiser does not claim that *no* crime occurred or that *no* offense or wrong was committed by Granello or Conte, we shall go directly to the principal items of evidence relied upon to spell out the attempt by Granello to extort $25,000 cash from Holzman and to cut himself in for a quarter of all of Holzman's business.

The prosecution resorted in the first instance to the testimony of the victim, Irving Holzman, (991, *et seq.*) who testified he was both a distributor as well as an operator of coin operated equipment in the Bronx, Manhattan, Kings, Queens, Nassau and Suffolk Counties.

Sometime during the morning of June 4, 1964, Conte came to Holzman's New York office where he introduced himself as a partner of Granello and told Holzman that Granello wanted to see him. Holzman replied if Burns wants to see me, tell him to stop by the office.

Granello phoned Holzman and agreed to have lunch with Holzman at his New York office, but the luncheon never came off.

The weekend came and went and on Monday, June 8, 1964, Holzman left his home in Roslyn as was his custom for his New York office. While on the way to the City, his wife was assaulted in her Roslyn home by a gang of young toughs posing as delivery men.

The fact of the attack was testified to by Holzman's wife, Ruth (533, *et seq.*), and a neighbor, Ann Rettek (522), who, while walking the dog, saw the attackers and heard Mrs. Holzman's screams for help in her home.

When Holzman arrived at his New York office, he was notified of the assault on his wife and returned immediately to his residence in Roslyn. It was at this point that Holzman learns that Granello has been looking for him so he telephoned Granello who told him that he would not talk to him on his home phone, but that he should go to an outside phone and call him back which he did (1034).

Granello told Holzman that he wanted to see him and that they could have lunch at Charles French Restaurant which Holzman refused to do because of the assault on his wife.

According to Holzman, he now became suspicious, first because Granello suddenly reappeared in his life, and then his wife is mysteriously beaten; so he called Granello and agreed to meet him at Charles French Restaurant that same Monday afternoon.

The meeting took place and Granello immediately volunteered that he learned about Mrs. Holzman's beating from a radio report on the way back to New York Monday morning from his summer place at Greenwood Lake. Further, that if he, Granello, had returned on Sunday (1039):

> "I could have avoided this whole thing because the people I am with are animals."

Continuing Holzman testified Granello declared (1039, 1041, 1041):

> "'You know, I hear that you grew into the million dollar class and nobody who gets in that class doesn't have somebody with him.'

He says, 'Even Costello had to give up a piece.'

Q. Did he say who he meant by Costello? A. No, but I assumed that he was talking about Frank Costello. That's the way it sounded.

Q. He said even Costello had to give up a piece? A. Yes.

Q. Go ahead. A. Then he says to me, he tells me that it was me, it wasn't my wife that people came into the house for and gave her that beating, it wasn't my wife they were looking for, *it was me.*

He says, 'They were looking for you' and he says, 'There are certain people who think they should have a piece of you and I figured out that—'

Mr. Bouse: I move it be stricken.
The Court: This is the conversation.

Q. This is Granello saying? A. Yes.

The Court: Overruled.

Q. In other words Granello figured out?

Mr. Bouse: Oh, I didn't understand that this is Grannello who figured it out.

Q. This is his actual words? A. Yes, he said, '*I figured out the best thing you do, you come up with $25,000 in cash for the family*' and he says, '*I don't talk about the family to everybody.* I am talking to you about it because I trust you with anything and then *you will give me 25% of all your business,*' and he says, '*I don't mean by building an equity of 25% and I don't mean of a small percentage,*' he says, '*Because Sally Burns pisses away 100 a day*'." (Italics mine.)

Holzman replied that he would have to think it over; that he had a partner and he could not understand why he had to give $25,000 to some "family" or take in a partner. As Holzman left the restaurant, he saw Conte at the bar drinking with a redhead.

Holzman now knew he was in real trouble so he immediately reported the threat by Granello to the Nassau County authorities (1043), and with Holzman's permission, Holzman's home phone was monitored.

Pursuant to direction, Holzman called Granello who again advised Holzman to call from an outside phone which Holzman agreed to do. The phone in question was a public pay phone in the Oak Pharmacy nearby the Holzman residence in Roslyn. The calls made from Holzman to Granello from the public pay booth in the pharmacy were all monitored with Holzman's consent. Pursuant to Police direction, Holzman repeated that he would not give $25,000 to the "family".

Conte then called Holzman at Holzman's home and told him to call Granello again, and between Granello and Conte they advised Holzman that Granello could be reached at Patrissey's a restaurant on Mulberry Street in downtown New York or at the Headline Bar.

Holzman pursuant to Conte's direction, then phoned Granello at the Headline Bar to tell him that he could not then meet Granello because of his wife's fear and physical condition resulting from the beating. Holzman stayed in his home through the weekend which takes us up to Monday, June 15, 1964, when he went to New York where he met Granello for a second time at his New York office. Holzman was then being shadowed by the captain of his pleasure boat, who Holzman pretended was a detective. Holzman again told Granello that he did not need any partner and would not give Granello $25,000. According to the witness, Granello agreed to reduce Holzman's contribution of $25,000 to the "family" to $12,500 with the promise that Granello would make up the difference if Holzman would make Granello a 25% partner in all of his business ventures. Holzman refused.

On Thursday of the same week, June 18th, Holzman met Granello again in his New York office, and Granello demanded then and there $5,000 for the "family" by Friday night to show the "family" good faith (1215-1219).

The ruse then being carried on by Holzman with regard to Captain Ambler, his boat captain, had by now been discovered by Granello, and Granello advised Holzman that he did not need a detective as he could straighten everything out (1217).

Holzman testified at this point he was truly frightened of Granello and was stalling as long as he could, but Granello kept insisting on the $5,000 for the "family" (1223).

On the following Monday, which would be June 29, 1964, Granello phoned Holzman at his home and Mrs. Holzman answered. When she realized it was Granello, Mrs. Holzman declared that if he did not leave them alone, that she was going to the Federal Bureau of Investigation.

By now, it was becoming obvious to Granello that Holzman was no easy pickings so on the very next morning, Holzman's married daughter, Dolores Billing (939, *et seq.*), who resided with her husband, Ronald in Plainview in the Town of Oyster Bay, received a telephone call and was threatened (953).

> "If your father doesn't cooperate we'll come to Sylvia Lane and kick your fuckin' pregnant belly in."

Thereafter, there were a whole series of calls between Holzman and Granello wherein Granello tried to induce Holzman to come to New York City to talk, which, of course, Holzman did not fall for.

It was at this juncture that Holzman's New York office was bugged with Holzman's consent, and a meeting with Granello was held on Monday, July 2nd.

The tape recording of the bugged conversation was transcribed by an official Grand Jury stenographer and copies were made available to each member of the jury as well as defense counsel and the judge so that all could follow the playing of the tape in the courtroom. The tape itself was People's Exhibit 7 whereas the transcript is People's Exhibit 7A. The tape recording as played for the jury was recorded and will be found in the record on appeal starting on page 1283. The tape conversation demonstrates clearly and unequivocally the nature and quality of the pressure that Granello was bringing to bear on Holzman. It is shot through with innuendo and inference that is susceptible of only one conclusion, and that is, Holzman should pony up the $25,000 for the "family" as well as make Granello his partner.

For example, when Holzman tells Granello that his associate, Joey Albino, does not want a partner, Granello replies that he told Rocky Graziano to speak to Joey Albino (1286; 1328-1329).

Any doubt or curiosity remaining regarding the true meaning and intentions of Granello are cleared up conclusively by People's Exhibits 9 and 9A, a taped telephone conversation and typewritten transcript thereof between Conte and Kaiser regarding the beating of Albino, the Holzman ally.

Even more enlightening was the bugged conversation of the meeting between Granello and Holzman in Holzman's New York office wherein Holzman attempts to find out from Granello what "family" is coming into his business, uninvited and for free with Granello. The tape and transcript thereof are People's Exhibits 7 and 7A, respectively.

Granello in what could easily be an Amos-Andy dialogue, if it was not for real, does not want to reveal the "family" in question. Holzman is told outright by Granello (1294):

> "No, you can't know that * * * that's impossible, you can't know because, uh, no matter what happens you can't know * * *."

It appears that at times Granello himself becomes desperate undoubtedly because he has made certain promises to the "family" regarding Holzman that now seem to be slipping through his grip. For example, Granello reminds Holzman that (1300):

> . There are people from the past that felt that they have interest in you * * * and there's more than one person, and I'm not going to mention their names * * *."

Granello of all things then agrees to put up one half of the $25,000 going to the "family" if Holzman will only capitulate.

Holzman, of course, now wants to know why Granello suddenly will pick up one half of the tariff going to the "family". Granello replies (1313):

> "This would clear the road for me to be with you; not that I am paying a shake to be with you. I don't * * * but in this instant, the people that are involved, I want to clear them up and they have no interest in you, and there can be no further bullshit or nonsense, and this is not a sha- you may look at it as a shake. You say what am I paying? What are they giving me?"

The great trouble is Granello couldn't or wouldn't answer his own questions about "they".

The reason for Granello's hesitancy, if not fright, appears in the very next exchange. Holzman inquires of Granello (1314):

> "Is this got anything to do with this, with this guy with the cigar over in Woodside, over in Corona, or wherever it is?"

Granello replies (*supra*):

> "Don't ask, don't ask me that. Don't ask me these questions. I'm not going to answer them."

The man "with the cigar over in Woodside" is none other than Mike Miranda, a consigliere in the Vito Geneovese "family". The reason Holzman confronted Granello with Mike Miranda is because Dino Conte on June 4th, when he first contacted Holzman, brought Mike Miranda into the situation (1347-1348).

So it was that Holzman, probing to learn the identity of the "family" about to extort $25,000 in cash from him and muscle in on his business, said to Granello (1314):

> "When your man, Dino, was here * * * he mentioned that—uh—Miranda situation."

At the mere mention of Mike Miranda's name, Granello replied (1314):

> "Listen, I don't—I don't want you to ask me no, none of them kind of questions. I'm just going to tell you one thing; and I'm going to tell you; don't mention nobody's name. I don't want nobody's name mentioned."

It is perfectly obvious why Granello does not want "nobody's name mentioned". "Nobody" is Mike Miranda of the Vito Geneovese family.

In Cuba, Granello, according to Granello, was the "jefe" or "boss" (1315-1316), but the suspicion looms large that in Corona or Woodside, Granello's posture with the "family" is slightly different.

Holzman finally closed the door forever when he telephoned Granello at Patrisseys on Mulberry Street. A tape and transcript, People's Exhibits 8 and 8A corroborate beyond all doubt Holzman's testimony that Granello's efforts were nothing less than an attempt to extort $25,000 from him for what was probably the Vito Geneovese family through Mike Miranda, a consigliere, plus 25% of Holzman's business.

Numbers 1 and 2 appearing on People's Exhibit 8A are the voices of Holzman and Granello respectively. Of course, the court's attention is directed to the entire transcript, although the flavor is revealed by this brief exchange (1376-1377):

> "1—we're not going to take in any partners, and I can't take in any partners—
>
> "2 O.K., buddy.
>
> "1—in this business.
>
> "2 Now, I'm going to tell you something—
>
> "1 Yeah.
>
> "2—see. Now I'm going to tell you something, See, Irving see, you used me pretty good and, uh, uh, now, I'm going, I'm going to tell you something and you could do what you want, go whichever way you want. And it ain't a threat. It's a fact, see. Uh, if you think you're going to play with me you're making a big mistake. Now I tried to work out everything the way you want it, but I see you're taking like an inch at a time. I want to extend myself, but if that's the way it's going to be then you better go and get who you going to get. Understand what I mean? Go to the, uh, Cahn or the FBI or whoever you want 'cause *you're going to need them.* Do you understand that? Do you hear me?
>
> "1 Yeah, I hear you.
>
> "2 O.K. And, uh, if you think you're going to use me and you're going to play games with me, you ain't capable, see. You may think you are, and I'm trying to be nice, but I could see with you that there's only one way with you and *I am just going to unleash the people and let them do what the fuck they want with you,* you understand? Because I could see what it is with you, see. And you want to play with me that way, which you shouldn't do, and I told you not

to do it. You wanted—*now you've incurred my wrath,* you see. And we'll see who's going to come out on top. Because *anybody that's associated with you is going to wind up in the fuckin' hospital. And you'll see a fury that you never saw in your life and this is coming from Mr. Burns himself.* You understand?

"1 Yup.

"2 So when you, when you going to tell your people, you tell them that it's from me. You understand, Irving?" (Italics mine)

The Kaiser's Involvement

There can be no doubt that as between Granello, Conte and Kaiser, Granello was the "jefe", Corona notwithstanding. Nevertheless, it is clear beyond cavil that Kaiser was a knowing participant in the efforts of Granello and Conte to extort $25,000 from Holzman and to cut themselves in for 25% of Holzman's business ventures.

Proof of this fact stems principally from two telephone conversations between Kaiser and Conte which were intercepted and recorded from the phone at the Headline Lounge. The transcripts in question are People's Exhibits 9A and 9B.

These exhibits constitute the essential proof that Kaiser well knew the purpose for and manner in which the information acquired by him from Bob Luttman was being used by Conte and Granello.

Kaiser is calling in both cases from Kitty City in the old Flushing Meadow area where Kaiser apparently worked as some kind of guard or bouncer.

The voices on both transcripts are numbered 1 and 2. In each case, the numerals represent Kaiser and Conte, respectively.

We shall, for the further convenience of the Court, give a short summary of both conversations.

Exhibit 8A

The conversation opens with a discussion of the possibility that Joey Albino, Holzman's aid, might have been threatened or beaten by Granello who is referred to throughout both conversations as "Sally" or "the man", and the conclusion is it would have been wrong for Albino to have been assaulted.

Suddenly, Kaiser volunteers that:

> "There's no question McGloyne's still alive. He's over here [Kitty City] with his whole fucking gang of kids."

Conte and Kaiser then turned the discussion to the efforts to extort the $25,000 from Holzman and to get a piece of Holzman's business, and both agree that the conspiracy should be abandoned because Sally handled the operation badly. There can be no doubt that Kaiser was thoroughly disgusted with the methods resorted to by Sally and the crude way that Sally used the secret information acquired by Kaiser from Bob Luttman, an employee of Holzman. Kaiser's concern developed over the fact that Holzman would have to be a moron not to suspect that it was Bob Luttman who was feeding the information on Holzman that Sally used to make his criminal judgments.

Kaiser obviously had wanted to protect Luttman from Holzman and was upset because he believed that Luttman would be fired.

Kaiser then complained that:

> "If it [the shake] would have been handled the way I told you in the fucking beginning, it would have been done and it [the extortion] would have been over with now."

Kaiser was obviously bitter because Sally did not, as he suggested, bring:

> "in an outside element like I told him to * * * to straighten it out, instead of just walking in there, uh, telling the fucking man that anybody as big as he is, nobody gets as big as he is in this business unless he's with somebody or he don't last."

Both Kaiser and Conte were of a mind that the attempts to extort the money from Holzman should now be dropped, but it then appears that Kaiser exercised a second thought and suggested:

> "What I would do is maybe wait a month."

Conte obviously disagreed, and they went back to the subject of who was to blame for blowing the criminal efforts to extort $25,000 for the "family" and to get 25% of Holzman's business. Both Kaiser and Conte disavow any responsibility. Indeed, Kaiser declares:

> "It wasn't handled by me badly, * * * the fucking information I brought over there was all correct, so, uh, there was nothing handled by me badly."

Boasting a little bit, Kaiser then stated:

> "I brought, I brought, the man over a shot for you and for him * * *."
>
> "So the man's got nobody to blame but himself, Dino, because, uh, there was nothing inaccurate that I brought to the man. The only thing is he presented it wrong."
>
> "Well, well, let him go to Cahn. Because there's nothing they can do cause Sally's forgetting about it."

Apparently, Kaiser and Conte believed that with the abandonment of the conspiracy by Granello, there was no criminal liability and that no violation occurred unless the money had been paid.

People's Exhibit 9B

The second conversation is as truly bizarre as any that has come to the attention of this office in this decade. For in it, Kaiser and Conte discuss, amongst other things, the selection of a new and different "victim" who might satisfy their criminal greed. On this score, the Court is referred to the following exchange between Kaiser, again speaking from Kitty City, in the Douglaston area, to Conte at his bar in the Times Square area of Manhattan.

> "Yeh, yeh, I'll tell you there's a lot of fucking Cadillacs pulling out of this place [Kitty City]. Well, fine one. Jesus, I'm starving over here. Pulling out of this fucking driveway here. Find a victim there. That's for sure. Sure, we got to find a victim. Now, we, we lost Holzman so now we got to find another victim. Find somebody else out there. Well, we'll see what else come up. Well, I got something coming up pretty soon. See what happens. Maybe I can retire things go right in the next few weeks. Well, just be careful now, that's all, be fucking careful."

Kaiser and Conte then talk about "this thing that time on Park Avenue" and Kaiser brought up the subject of "Max Factor" the manufacturer of cosmetics, as he referred to the fact that when he was in a drug store, and:

> "I saw a picture of Max Factor. * * * I wonder if he's got any money. * * * He's, he's pretty big in that business, too, you know. * * * When I come over I'll tell you about it what this guy told me."

They then discussed the fact that Holzman was "fucking terrified" and staying in his home and not coming to New York.

As a matter of fact Conte remarked that Holzman "can never walk into New York again he knows that."

They also discussed the fact that Sally flew to Chicago to see a "Lyn Durant" about Holzman.

Continuing they discussed the fact that Holzman will not be able to hold the operating part of his business, that is, the Routes unless he services the equipment in the various bars and grills throughout Metropolitan New York, and this he cannot do while he is buttoned up in his home. Further, that they believed that this is what Sally now has in mind.

Both Kaiser and Conte then discussed the money that Holzman paid to Granello because of the "Gallo business". Kaiser then remarked that Sally was "terrorizing" Holzman.

> "He told him uh, he says, 'I'll guarantee you you can't come to New York'."

This then is the general flavor of the conversation between Kaiser and Conte.

It is little wonder then why in the face of the evidence, not merely out of the mouth of the victim, but the taped conversations, that Conte and Granello plead guilty. Indeed, it is rare in this day to encounter a cruder attempt to extort $25,000 and 25% of a man's business than the evidence reflected by the proof in this trial.

SUMMARY OF ARGUMENT

POINT I

In Section A, Respondent argues that there is no merit in petitioner's contention that Section 605 of the Federal Communications Act created an enclave of telephonic privacy, protected by the Fourth and Fifth Amendments beyond the power of government to invade even under the authority of a Warrant. Respondent contends that wire tapping is not within the governance of the Fourth Amendment, and that, even if it were, a mere statutory enactment cannot work an alteration in the provisions of the Fourth Amendment so as to bring a new protected class within its scope while, at the same time, exempting that class from the Warrant provisions, which, by the clear terms of the Fourth Amendment, are applicable to all protected classes within the shelter of its safeguards. The exclusive method of constitutional amendment is set forth in Article V of the Constitution, and that Article does not permit amendment by mere legislative act. Moreover, Section 605 was repealed and can no longer serve as a vehicle of protection.

In Section B, Respondent respectfully urges that this Court limit the *Katz* rule to its special facts and hold that a non-trespassory wiretap interception of a telephone conversation is not a search and seizure within the control of the Fourth Amendment. Respondent fears that a contrary decision might render constitutionally suspect all other privacy invading investigative devices and might induce State and federal courts, acting upon the doctrinal implications of such a holding, to decree that all proof obtained by privacy invading investigative devices is inadmissible in evidence unless secured under the authorization of a Warrant valid under Fourth Amendment standards. Respondent prays that this Court limit the scope of the *Katz* rule to electronic eavesdropping which involves *some physical contact* (whether amounting to trespass or a penetration or not) with the structure in which is occurring the conversation overheard. Such a decision would constitute a natural doctrinal progression from existing precedent.

If the *Katz* doctrine is not so confined in this case, the Court's decision herein may exercise a constraining effect on the activities of law enforcement officers mindful of the possibility that the Court's pronouncement may give a pretext for civil suits or criminal prosecutions against public officials under the federal civil rights laws for invasions of privacy. If the Court's decision in this case should reflect a broad conception of privacy, it may well encourage a massive outpouring of damage suits and injunction actions against federal and local governments and officers based upon every conceivable invasion of every personal interest which has ever been classified under the vague concept of privacy.

If law enforcement officers are compelled to obtain warrants before employing privacy invading investigative techniques, law enforcement will be dealt a fatal blow, since such techniques are usually invoked at a time when there is insufficient evidence to make out a showing of probable cause. Indeed, such techniques are utilized in order to obtain sufficient proof to enable the procurement of search warrants and eavesdrop orders. It would be impossible under such a strict system of legal control to deal effectively with organized crime.

It is respectfully urged that even the limitation on the *Katz* doctrine contained in the concurring opinion of Mr. Justice Harlan would create a legal regime involving certain disadvantages to law enforcement that might be avoided by a doctrinal formulation such as that prayed for by respondent.

If this Court places its imprimatur of approval on a broad principle of privacy, there may, as a consequence, be visited upon the American system of criminal justice tasks and burdens beyond its capacity to assume. Lower courts, by a bold course of inference, might deduce the conceptual consequences of the Court's full-blown statement as protecting all conceivable official invasions of interests generally grouped under the vague rubric of privacy. Moreover, the proliferating nuances of an expanding right of privacy would multiply pre-trial motions and hearings in State and federal courts and provide innumerable additional pretexts for the invocation of the federal habeas corpus remedy, thus imposing impossible strains on State and federal systems of criminal justice.

If the Court should apply the *Katz* doctrine to this case so as to hold or imply that the Fourth Amendment does not merely safeguard protected areas, but, more, preserves the privacy of the accused against privacy invading investigative techniques, the Fourth Amendment's protective dimension would be enlarged far beyond traditional boundaries and the rule of standing which is still recognized in this Court's Fourth Amendment jurisprudence, albeit in somewhat relaxed form, might fall by implication.

That such might be the results of a magisterial pronouncement of doctrine which aggrandizes the regulatory grasp of the Fourth Amendment is suggested by the history of criminal justice in this country. The catalytic effect of this Court's decisions produce results beyond its intentions as the implications of its doctrinal formulations are searched out and acted upon by lower courts. Nor will this Court obviate such dangers by a limited exercise in legalistic innovation. A modest advance in doctrine is but preparation for a further advance. The goal which this Court regards as marking the limits of the possible may provide the point of departure for a successor Court, so that, by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement.

Such a persisting attrition of official competence may produce a fundamental alteration in the balance of social forces, such that extra-legal power will no longer wear the aspect of the transient and eccentric, but rather will stand forth as a virulent and ineradicable feature of a permanently flawed society.

Since official wiretapping, state and federal, is now controlled by the federal Safe Streets Act, and, in addition, by State laws, the protection of privacy will not be sacrificed by a holding such as that prayed for by Respondent.

In Section C, Respondent contends that the attempt to justify the extension of the Fourth Amendment's scope to include telephonic privacy by a reference to alleged inherent purposes of the Fourth Amendment is a questionable methodology. History informs us that the Framers formulated the Fourth Amendment in response to restricted evils and that this Amendment was designed to protect domiciliary repose and property rights, rather than that subtle interest of modern derivation sometimes referred to as the right of privacy. The type of interest which the Fourth Amendment was designed to protect is not the same as that sought to be vindicated under the claim that telephonic communication should be conducted without being overheard.

The attempt to argue that the Fourth Amendment's "purpose" was the protection of privacy is a tenuous exercise because the concept of privacy is so vague that it could hardly constitute a coherent purpose. This concept has been applied to a wide variety of dissimilar interests, values and situations and the various interests which have received protection under the rubric of privacy can not be reduced by conceptual analysis to a common doctrinal essence. Thus when it is argued that it is the "purpose" of the Fourth Amendment to protect privacy, we really do not know what is meant by that assertion in concrete terms.

The Fourth Amendment is a provision which had its inception amid the stress of special circumstances. Its plain language bespeaks the limited character of its objectives. It can not be converted from an ad hoc vehicle to an absolute principle by questionable recourse to a fancied underlying "purpose". Such a technique as that impliedly contended for by petitioner could be used to expand every constitutional guarantee far beyond the limits suggested by its language and history and would result in the continual amendment of the Constitution by judicial fiat in violation of the exclusive amendment procedure set out in Article V of the Constitution.

In Section D, it is respectfully urged that this Court should not declare wiretapping to be regulated by the Fourth Amendment because to constitutionalize this subject is to remove it from the control of the legislative power, to foreclose all future experiment and to prevent the people from dealing with it in accordance with emerging knowledge, changing needs and an altering balance of interests. It is not necessary for this Court to intervene in the field of wiretapping since that field is already effectively controlled by the federal Safe Streets Act recently enacted by Congress.

POINT II

In Section A, respondent argues that the telephone conversations herein *did not occur in a situation of privacy* and thus were not eligible for protection under the *Katz* rule, even if wiretapping were within the regulatory ambit of the Fourth Amendment.

In *Katz,* this Court held that the conversant in the telephone booth who shuts the door behind him is entitled to assume that his conversation will be private. However, the two conversations here in question had occurred between petitioner, speaking from an outside phone, and co-conspirator Dino Conte, speaking from a telephone at the Headline Bar. The telephone tapped at the Headline Bar was *not in a* coin *booth and it had an extension.* The telephone line at that location also had two portable phones. Since the petitioner occasionally worked at the bar on weekends, he certainly knew the nature of the telephone arrangement at the Headline Bar, and he must have been aware that his telephone calls to the Headline Bar could have been overheard on the extension or partially overheard by patrons standing near the telephone. Thus petitioner was not reasonably entitled to assume that his conversation was being conducted in a situation of privacy.

Moreover, regardless of the reasonableness of his assumption, the controlling fact is that the objective conditions in which each conversation took place did not amount to a situation of privacy. At the very least, it may be said that petitioner has not discharged his burden of demonstrating to this Court a factual record unambiguously disclosing an unjustified invasion of his constitutional rights. A different holding in this case would provide a doctrinal justification for the claim that all privacy invading investigative devices are governed by Fourth Amendment standards.

In Section B, Respondent shows at the outset that there is a serious question as to whether petitioner effectively raised in the New York Court of Appeals questions as to whether the wiretap order here involved was supported by a showing of probable cause and whether it complied with Fourth Amendment criteria.

Respondent also contends that even if the *Berger-Katz* criteria are applied retroactively to this case, and it is urged that they should not be, then those criteria should not be enforced in their full rigor, lest the effectiveness of the wiretapping investigative device be compromised. In this section, Respondent examines in detail the various criteria mandated in *Berger* and suggests which are inappropriate and the way in which they should be relaxed or modified if they are to be applied to the subject of wiretapping. Such an appropriate relaxation of the *Berger* criteria would seem warranted in view of this Court's holding in *Camara* v. *Municipal Court* that Fourth

Amendment warrant procedures need not be enforced to a nicety in an area of investigation where full compliance would be difficult. Indeed, the concept of the unreasonable search and seizure reflected in the Fourth Amendment suggests the propriety of a flexible approach. It is noted that this Court, in *Katz,* seems to have relaxed the notice and the automatic termination requirements enunciated in *Berger* and respondent urges that the Court continue to adhere to this common sense approach.

Respondent also urges in this section that the Court hold that petitioner, not being the owner of the premises in which the eavesdropped telephone line was located, does not have standing to raise issues concerning the compliance of the wiretap order in question with Fourth Amendment standards.

Respondent also demonstrates in this section that the wiretap papers achieve an adequate degree of particularity in describing the persons to be overheard and the conversations to be intercepted.

Respondent contends that even if the Court should hold wiretapping to be within the regulation of the Fourth Amendment, the crucial question before it would concern the constitutional acceptability of the wiretapping in this case and not the constitutionality of the eavesdrop statute under which it was obtained. The contrary approach of *Berger* need not be followed in this case since the statute in question, Section 813-a of the Code of Criminal Procedure, no longer exists, having been replaced by a new statute enacting *Berger*-type criteria. Thus it is Respondent's view that the validity of 813-a and the question of whether the order herein was obtained under a valid statute or under the inherent power of the Court (seemingly recognized in *Osborn* v. *United States*) or under the authorization contained in Article I, Section 12 of the New York Constitution are not issues of federal constitutional proportions.

In Section C, Respondent discusses the form of the wiretap order and the proceedings culminating in its issuance and demonstrates that the order and the manner of its execution were not violative of Fourth Amendment standards.

POINT III

In Point III, Respondent reasons that petitioner's claims founded upon Section 605 of the Federal Communications Act are a legal nullity because 605 has been repealed by the federal Safe Streets Act, with the result that 605 has abated and been rendered inoperative. Respondent's position in this regard is in accordance with the doctrine propounded by this Court in *Hamm* v. *Rock Hill* (379 U.S. 306).

The *Hamm* rule is consistent with the long established practice of the common law. Its implementation would be particularly appropriate in this case because for 34 years it was the policy of the federal government and all of its agencies, judicial, legislative, and executive, not to treat state and federal wiretapping as violative of federal public policy. Thus it would offend the canons of reason if a federal court suddenly were to reverse that policy now by enforcing 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

POINT IV

Here petitioner argues that even if it be assumed, *arguendo,* that the Fourth Amendment governs the use of wiretap evidence of the type here in issue and that 605 did not abate, this Court should not give retroactive application to its decisions in the *Berger, Katz* and *Lee* cases so as to invalidate the judgment of conviction in this case.

State law enforcement officers have relied on the previous state of the law and the acquiescence of this Court and all federal agencies in their use of wiretap evidence in State criminal trials. A retroactive application of the new doctrines of *Berger, Katz* and *Lee* would not remedy a defect in the fact-finding process or achieve the value of deterrence and would have an unfavorable impact on the administration of justice. Respondent disagrees with petitioner's alternative suggestion that the limited retroactivity principle of *Linkletter* v. *Walker* should be applied to this case. Even a limited retroactivity would impose serious hardships on the administration of justice.

Petitioner urges that the Court refuse retroactive application to *Berger, Katz* and *Lee* and instead apply the prospectivity rule of *Stovall* v. *Denno* so as to hold that *Berger, Katz* and *Lee* shall regulate only acts of official evidence gathering occurring after the dates on which these decisions were announced by this Court. Since both the wiretap interceptions and the trial of this case occurred before the *Berger, Katz* and *Lee* decisions were handed down, it is respectfully prayed that these decisions not be held determinative of the issues herein.

There is no reason why retroactivity should be enforced in this case since Congress has enacted a law strictly regulating official wiretapping and since all wiretap orders which were issued in New York State between the time the *Berger* decision was announced and the new New York *Berger* type statute was enacted were required to comply with the *Berger* criteria by the holding of the New York Court of Appeals in this case rehabilitating the previous New York State wiretap statute. Such a rehabilitative exercise is acceptable and raises no federal questions.

The previous New York wiretap statute required authorization by a court order complying with some of the *Berger* criteria and founded upon a showing achieving a level of demonstration substantially the same as a showing of probable cause. Thus neither the objective of deterrence nor any other objective would be served by retroactive enforcement in this case.

POINT V

Respondent urges in this Point that the use of the wiretap evidence herein was not violative of the Ninth Amendment and that the Ninth Amendment does not establish a right of privacy as against telephonic eavesdropping.

It would be ironic if this Court were to accept petitioner's claim of an absolute retained right of telephonic privacy under the Ninth Amendment. It has consistently held for almost three decades that the national commerce power is plenary within its limits and that the reserved power referred to in the Tenth Amendment does not exercise an independent limitation on the commerce power. But if it accepts petitioner's claim of absolute right, the implication of such an acceptance would be that all national legislation based upon the commerce power which permits official wiretapping is unconstitutional.

If this Court should accept petititioner's contention that the Ninth Amendment contains a flat prohibition against all official wiretapping, whether pursuant to the authorization of a warrant or not, then there would be called into constitutional question all of the other privacy invading investigative devices employed by law enforcement officers.

This Court has not given sanction to such doctrines of complete prohibition in the past and its holding in *Griswold* v. *Connecticut* indicates that Ninth Amendment rights and rights enforceable through the due proces clause of the Fourteenth Amendment are subject to reasonable regulation under the police power.

If petitioner's Ninth Amendment claim should be sustained, this Court's attention will be burdened by every conceivable type of privacy claim against local and federal government. The Court will be under unrelenting pressure to undertake a new career of extreme judicial activism in the service of a novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy. Thus the Court will be called upon to invade a sphere of local life beyond the bounds of its historical concern.

The Ninth Amendment seems to refer only to rights in existence at the time it was adopted. Since petitioner appears to concede that the interest in telephonic privacy was unknown at that time, he cannot reasonably argue that the Ninth Amendment is protective of that interest. The interest protected in *Griswold* v. *Connecticut* was an immemorial right.

Moreover, as *Griswold* indicates, the Ninth Amendment simply refers to rights; it does not establish rights. Therefore if it be assumed *arguendo* that petitioner is correct in suggesting that such rights are evolving rather than static, it would follow that the states and their citizens shall determine the content of new rights and are empowered to regulate them in the public interest. The sovereign People, in contriving the structure of state government, and in constituting it the repository of their sovereignty, have delegated to it the authority to regulate those rights which are recognized in the Ninth Amendment. With respect to the State of New York, the process of delegation is specific and visible. In Article I, Section 12 of the New York Constitution of 1938, and in succeeding revisions thereof, the People have extended to law enforcement officials the power to obtain and use wiretap evidence.

Certainly, the Framers of the Ninth Amendment did not conceive that it should be invoked by a national judicial organ to supervise the relationships between the states and their citizens and to forbid the states to exercise such powers as the People saw fit to grant them in State Constitutional Conventions. The theory of the Ninth Amendment urged by the petitioner is radical. If accepted, it will be the means of working a fundamental change in the federalist structure of authority ordained by the Framers and of changing our form of government from federalist to quasi-unitary. Thus this Court would be drawing to itself the authority to nullify the power and right of the People to choose the pattern of rights and duties which it felt best calculated to secure the general welfare.

Since the interest in telephonic privacy has not achieved uniform recognition throughout the country, it follows that petitioner is asking this Court to create a new right by judicial fiat despite the limitations on the federal judicial power contained in the judicial article of the Constitution. Dean Roscoe Pound, perhaps the most distinguished student of our public law, has stated that the retained rights referred to in the Ninth Amendment are to be defined and enforced by the states through their legislative institutions or by the People of the United States expressing themselves through the process of constitutional amendment.

POINT VI

In Point VI, Respondent urges that the due process clause of the Fourteenth Amendment affords no basis for a reversal of the judgment of conviction.

In Section A, Respondent contends that the due process clause of the Fourteenth Amendment does not protect a pure due process right of privacy independent of the specific guarantees of the Bill of Rights. Official wiretapping is a policy matter. It is not of such a nature as to require that this Court supervise local police eavesdrop activity. To the extent that our people wish to deal with this problem in a national frame of reference, they may employ the machinery of the national legislative establishment.

The decisions of this Court reveal that it has not found a right of privacy in the due process clause of the Fourteenth Amendment. Even the common law of torts has been slow to recognize under the right of privacy concept the special sort of interest for which petitioner seeks constitutional protection. The various forms of tort action grouped under the vague rubric of right of privacy have no common conceptual core.

Griswold v. *United States* does not really enforce a right of privacy through the Fourteenth Amendment. It merely reaffirms the traditional principle that the police power may not express itself in the regulation of social situations beyond the ambit of its authority or by a regulatory means ill-adapted to its objective or more drastic than necessary. The *Griswold* Court simply said that it would not permit the limitation of the freedom of marital decision and action with respect to the use of contraceptives since such matters of personal discretion are beyond the power of government to treat. *Griswold* is really not a privacy decision. It affirms a "freedom to" do something, not a "freedom from" something. There is nothing in *Griswold* which would bar the search of the marital bedroom provided that such a search was authorized by a warrant obtained through a showing that there was probable cause to believe that such a search would yield evidence of a crime within the legislative power of the state to punish.

The government in this case (Kaiser) did not *regulate* telephonic privacy as the government in *Griswold* sought to regulate the marital relationship. The New York wiretap law is not a regulatory act and thus it does not "deprive" of "liberty" within the meaning of the due process clause. Moreover, telephonic privacy is not "liberty" within the meaning of that clause since liberty implies freedom of action, freedom to do something and suggests that government can not limit freedom of action except in a good social cause. The word "liberty" does not contemplate subtle intrusions on privacy which do not limit individual freedom of action.

It is true that the Fourth Amendment has been held to be incorporated in the due process clause but the Fourth Amendment is not really a privacy law. It is unjustified to read into the Fourth Amendment the alleged underlying value of privacy since such a reading would imply that the Amendment's purpose is to protect all of the myriad and distinct interests (having no common conceptual nucleus) which have been classified under the vague term "right of privacy" at one time or another in our history. This Court's due process jurisprudence, as reflected in the *Wolf, Irvine* and *Rochin* cases, indicates that there is no pure due process right of privacy. The penumbra technique is not applicable here since the interests protected by the First, Third and Fifth Amendments are not the same as that asserted by petitioner.

If this Court should recognize a due process right of privacy, state and local government will be inundated with litigation seeking to limit its prerogatives. Thus there may be occasioned an unobtrusive process of attrition which subtracts from the competence of government and undermines the regulatory process by which the discord and complexity of a highly interdependent society is brought within the coordinated control of society's chosen agencies of adaptation.

Even if the right of telephonic privacy as against official wiretapping were widely recognized in the common law or by popular custom (and it is not), that would not entitle it to protection under the Fourteenth Amendment since the due process clause protects only that relatively small category of rights which are truly fundamental in character. Moreover, petitioner's claim of absolute right is inconsistent with the long established principle that all rights must yield to transcendent considerations of public welfare. The police power principle of necessity, sometimes referred to as the emergency power, has long been recognized in the literature of due process and provides ample justification for the official wiretapping which occurred in this case. Indeed, even in the absence of emergency, the rights protected by the due process clause are subject to regulation under the police power.

The claim of privacy urged upon the Court is new in conception and has yet to win its way to general social or legal acceptance. Like other newly emergent interests, it should seek its recognition in the domains of legislation and public opinion. Its claim of right has not attained sufficient maturity to engage the attention of this Court.

In Section B, Respondent argues that an absolute right of privacy as against law enforcement is indefensible on either philosophical or practical grounds. It is the creature of a legal imagination which sees the claims of freedom in an excessively restricted frame of reference and which fails to appreciate that judicious governmental intervention in the realms of freedom and privacy enhances the total quantum of freedom and privacy. The absolutist outlook fails to recognize the organic nature of society. Its philosophical essence is a naive individualism which views society in atomistic terms. It ignores the sovereign insight that rights are the product of organized society and, except to the extent mandated by unmistakable constitutional language, subject to those adjustments in content and extent necessary to the health and well being of that society.

Law enforcement should be accorded a preferred position in the pantheon of constitutional values since it is one of the great corrective processes of the free society. Through its enforcement of a democratic scheme of authority, it secures that state of social equilibrium in which public discourse may achieve its highest creativity. It disciplines and holds in check those malignant centers of organized evil which threaten the primacy of the democratic state and activate the extra-legal strategies by which social power is removed from the possession of the people, thus denying them the means of exerting democratic control over the ends and processes of social life.

In Section C, Respondent contends that even if the due process clause protected a right of telephonic privacy, that right would be subject to regulation or invasion short of regulation under the police power of the state. It is demonstrated that both official wiretapping in general and the wiretapping here involved served the interests of society and thus are acceptable under those standards of constitutional legitimacy which govern the exercise of the police power.

In Section D, it is asserted that even if petitioner could justify the claim of a violation of due process rights, he is not entitled to reversal of the judgment of conviction because the due process jurisprudence of this Court does not require the exclusion at a criminal trial of evidence obtained in violation of due process standards at the pre-trial stage.

While the Court has recognized an exception to this pure due process principle in the case of confessions, the principle, discernible in the *Wolf, Rochin* and *Irvine* decisional axis, is applicable to the present circumstances, since they do not involve the obtaining of evidence by means of physical brutality within the condemnation of the *Rochin* rule. The *Mapp* decision did not effect a transformation in this pure due process principle because the exclusionary rule there mandated was viewed in the Court's opinion as an ingredient of the Fourth Amendment and not a command of pure due process.

Nor may the petitioner rely upon this Court's "fair trial" jurisprudence. The fair trial principle has been employed to deal with defects in trial procedure and the quality of proof. Wiretap evidence, being probative, raises no such questions.

That official wiretapping is not shocking to the sense of justice within the meaning of the *Rochin* rule may be gathered from the fact that 27 states permit authorized telephonic interception and the President's Commission on Law Enforcement and Administration of Justice has recommended a regime of judicially approved official wiretapping.

POINT VII

Here Respondent argues that the self-incrimination provision of the Fifth Amendment does not protect a right of telephonic privacy. The Fifth Amendment is not really a privacy provision in this sense, and, moreover, secret telephonic interception does not "compel" the testimony of the overheard party within the meaning of the privilege.

POINT VIII

In this Point Respondent contends that the wiretapping in question did not violate petitioner's First Amendment rights and official wiretapping in general does not restrict the liberties protected under those First Amendment guarantees enforceable through the due process clause of the Fourteenth Amendment. New York State has maintained a regime of official wiretapping since 1938 without noticeably repressing the free interchange of ideas. Indeed, even criminals, who have the most to fear from such wiretapping, continue to speak freely over the telephone, as did petitioner in this case. Petitioner offers absolutely no proof to support his theory in this regard.

If wiretapping is objectionable on the ground alleged, then all forms of official surveillance and investigation of conspiratorial gatherings are unacceptable for the same reason. Furthermore, the conversations here in issue constituted manifestations of a criminal conspiracy and criminal conversations may be prohibited under the criminal law and suppressed altogether.

It is well established that speech which is brigaded with illegal action or involves a dimension other than mere expression may be regulated in the public interest. The telephone conversations in question were not even "regulated" and there was no attempt to impede their free unfolding. At most, official wiretapping could only constitute an indirect restraint on First Amendment freedoms, and such indirect restraints have been held acceptable by this Court where they were occasioned by the valid invocation of the regulatory power. Even where it has been confronted with direct restraints on First Amendment freedoms, this Court has employed the ad hoc balancing test to sustain such restraints where they arose out of the exercise of the police power in the service of some important public interest. Certainly the enforcement of the criminal law and the protection of citizens who have been threatened with bodily harm are paramount functions of government.

Petitioner can not claim a right of privacy founded upon the First Amendment since the limited right of privacy there protected is a derivative right deducible from the freedom of association held to be protected by that Amendment. This case does not involve an expressionary associative context or the assertion of a right of privacy designed to implement the lawful right of association.

The telephone is not the natural setting for the exercise of First Amendment freedoms. It did not exist when the First and the Fourteenth Amendments were adopted. The Framers envisioned the mails, the printing press and face to face discussion as the agencies of expressionary freedom. There is little which can not be said freely in today's permissive climate of opinion and, in any case, the discussion of intimate or embarrassing matters does not contribute to political and intellectual creativity.

In view of this Court's refusal to classify advertising and certain forms of commercial expression within the category of protected speech, it is doubtful that communications concerning intimate or embarrassing subjects are favored with the safeguards of the First Amendment. Such communications can be carried on through the mails or by face to face confrontations. On any reasonable application of the balancing test, the interest in sexy or flirtatious talk or idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement. It is not vital to the well being of the public that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution. Certainly a regime which permitted official wiretapping and barred private wiretapping would not inspire timidity as to legitimate business matters, so economic life would not be restrained.

Not every interpersonal setting qualifies for the full protection of the First Amendment.

POINT IX

Petitioner's contention that the trial prosecutor erred in referring to his inculpatory recorded telephone conversations as confessions is a mere terminological quibble and does not present a federal question of substance to this Court. Even if it be claimed that the trial prosecutor may have departed from an exacting standard of semantic precision, it can hardly be said that substantial rights of petitioner were prejudiced thereby. This Court does not sit to vindicate exquisite niceties.

This Court has held that a court procedure does not offend against the due process clause simply because another method may seem to the Court fairer or wiser or to give a surer promise of protection to the prisoner at bar. The conversations in question were dramatically inculpatory. Does petitioner seriously argue that the case would be fundamentally different in its constitutional significance if the trial prosecutor, instead of using the convenient word "confession", employed some such unwieldy phrase as "statement of facts which, if given to a police officer, would have constituted a confession of guilt" or some other burdensome structure of rhetoric?

It can scarcely be argued that the difference between these two phraseological modes is so substantial as to require the corrective intervention of the highest court in the land. To argue thus is to found constitutional rights upon discriminations too subtle for the governance of a system of constitutional redress which takes the brute textures of social fact as the underpinning of decision and the realm of gross events as the theatre of its operation. Fundamental law is the ordering instrument of a mundane society, not the vindicator of luxurious refinements.

POINT X

In Point X, Respondent asserts that petitioner's anti-wiretap philosophy, as expressed throughout his Brief, and particularly in pages 46 through 48, is based on a crudity of analysis and a failure of policy insight. The President's Commission on Law Enforcement and Administration of Justice has found that the telephone is an indispensable weapon in the arsenal of organized crime. In declaring that telephonic communication is beyond the power of the state to investigate by the only effective method of investigation, wiretapping, petitioner, is, in effect, proposing that the telephonic medium be immunized from all social control and that society permit criminal forces to preempt a whole technology for their unimpeded use.

Petitioner's thesis is nothing less than this: that there is an instrument of social life so unique in its character and so superior in its status as to be exempt from those normal processes of social regulation and inquiry to which all other acts and agencies of social life are subject. Petitioner fails to realize that the telephone is a public instrumentality and liable to that high degree of regulation characteristic of all instrumentalities and utilities in the public domain.

Petitioner raises the dread spectre of official abuse. However, all official power is capable of abuse and to deduce the illegitimacy of power from the possibility of its abuse is to condemn all government to impotence. In view of the practical and mechanical limitations on electronic surveillance, petitioner's fear of pervasive and intensive official electronic surveillance is groundless.

At a time when extra-legal power jeopardizes the very foundations of lawful authority, a judicious balance of interests suggests the necessity of fashioning those instruments and institutional mechanisms through which the organized state can maintain the integrity of the community it serves. Wiretapping and electronic surveillance are indispensable instruments in the war on those malignant forces of privilege which challenge the primacy of democratic government itself. The general welfare is not advanced by an ideology which would deny the free society the indispensable means of its preservation.

ARGUMENT

POINT I

It is respectfully urged that this Court should hold that wiretapping is not regulated by the Fourth Amendment.

A. There is no merit in Petitioner's contention that section 605 of the Federal Communications Act brought telephone conversations within a realm of privacy protected by the Fourth and Fifth Amendments to the United States Constitution.

Petitioner argues, on page 59 of his Brief, that:

> ". . . The interaction between Section 605 and the Fourth and Fifth Amendments extended the reach of those amendments and required the exclusion of the wiretap evidence; more specifically, Section 605 was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments, and the absolute prohibition contained in Section 605 . . . made unreasonable, within the meaning of those Amendments, any search for telephone conversations . . .
>
> "We urge that Section 605 extended the individual's right of privacy to his telephone conversations; it broadened the enclave of privacy to which the individual may lay claim under the Fourth, Fifth and Fourteenth Amendments, regardless of whether those Amendments would otherwise directly provide such protection. Although Congress may not restrict the application of a fundamental Constitutional guaranty, it may, when acting within its legitimate area of authority—here interstate communications—confer additional rights upon the individual, which rights, by their nature are drawn within the protection of the Constitutional guaranty."

Petitioner's thesis in this regard has the dubious virtue of novelty, but it is founded upon a deficiency of insight and offends against the principle of separation of powers and the constitutional provision regulating the procedure of constitutional amendment.

It is urged by Respondent that this Court should hold that the Fourth Amendment does not govern wiretapping. However, if the contrary thesis be accepted and the Fourth Amendment is read so as to include telephone conversations within the boundaries of its protection, then it follows that such conversations may be intercepted under permission of a warrant, since every other protected class within the scope of the Fourth Amendment is subject to such invasion under the warrant provision of that Amendment. It is a principle of fundamental status that neither 605 nor any other mere statutory enactment can abrogate the Fourth Amendment's permission to invade an otherwise protected area on the authority of a warrant. Such permission can not be withdrawn by 605, since a constitutional provision can not be amended by statute. The exclusive method of constitutional amendment is set forth in Article V of the Constitution and precludes amendment by any other means than that set out therein.

If this Court were to accept petitioner's argument in this regard, it would, in effect, be re-writing the Fourth Amendment so as to exempt one and only one protected class, the telephone conversation, from the warrant provisions, which, by the clear terms of the Fourth Amendment, are applicable to all protected classes within the shelter of its safeguards. There has not been confided to this Court the overriding prerogative to so recast the provisions of a written constitution, its authority being confined in the judicial article to application of the law as written. Such a process of judicial amendment would violate the principle of separation of power which is implicit in our constitutional scheme, as well as the amendment provision of the Constitution.

The Fourth Amendment does not protect a general right of privacy (*Katz* v. *United States,* 19 L. ed. 2d 581) and does not ordain a vague, formless and generalized liberty exempt from all intrusion by the organized state. The Fourth Amendment only extends its safeguards to the protected classes specified in that Amendment and telephonic communication is not one of the specified categories. (It hardly could have been included since the telephone had not yet been invented when the Constitution was promulgated.) It follows that Congress can not add to the prohibitions of the Fourth Amendment simply by multiplying statutorily-created categories of protection against invasions of privacy of a sort not described in that Amendment. If Congress, for example, passed a law prohibiting interstate shadowing of suspects by State police officers, it could scarcely be claimed that such shadowing would thereby be forbidden by the Fourth Amendment.

B. It is respectfully urged that this Court limit the *Katz* rule to its special facts and hold that a non-trespassory wiretap interception of a telephone conversation is not a search and seizure within the control of the Fourth Amendment. A contrary decision, especially one ordaining a broad right of privacy, would render constitutionally suspect all other police investigative devices involving an invasion of privacy, since there may be no ground which seems plausible to State and Federal Courts on which such a principle could be limited so as not to apply to such devices as non-trespassory, non-electronic eavesdropping, informer intelligence, shadowing of suspects, visual observation with or without the use of binoculars, telescopes or other visual aids, non-trespassory stake-outs of premises in which criminal enterprises are being organized, etc.

Respondent respectfully prays that this Court reconsider the legalistic underpinning of its decision in *Katz* and confine the *Katz* rule to its special facts so as to render it inapplicable to the type of non-trespassory wiretapping at issue in this case. In order to achieve this result, it is not necessary for this Court to go so far as to revive the

Olmstead-Goldman-On Lee-doctrine that only trespassory eavesdropping is within the regulation of the Fourth Amendment. The Court need go no further than to hold that the *Katz* rule applies only to electronic eavesdropping which involves *some physical contact* (whether amounting to a trespass or not) with the structure within which is occurring the conversation which is eavesdropped.

Since the Court held in *Silverman* that a 6 inch penetration into a wall was sufficient to activate the Fourth Amendment and since, in *Clinton* v. *Virginia,* 377 U.S. 158, it was held in the concurring opinion of Mr. Justice Clark that the mere penetration of the sort made by a thumbtack rendered operative the safeguards of that Amendment, a restatement of the *Katz* rule dispensing with the need of *penetration* and declaring *mere contact* to be the determinant of constitutional protection would be a natural doctrinal progression. There would appear to be no obstacle in *Berger* to such an exercise, since, in Respondent's view, the Court of Appeals in this case was correct in interpreting *Berger* as not bringing wiretapping within the ambit of the Fourth Amendment. It will be recalled that the police officers in *Katz* had placed a recording device on the top of the telephone booth in which the overheard conversant was talking. Thus the recording device in *Katz* was in physical contact with the structure within which the monitored portion of the conversation was occurring.

It is true that a few phrases of the *Katz* decision may be read to stand for the proposition that the Fourth Amendment safeguards the person rather than protected physical areas, but these brief evocations should not be invoked for a purpose beyond their intention or permitted to foreclose an issue as momentous in its practical implications as that now before the Court. Neither practical reason nor constitutional theory requires that this Court should press to the limit of their practical applications in all unforeseen future situations those legalistic expressions which it invokes in the restricted contexts of limited controversies. As Mr. Justice Frankfurter has remarked in *Rochin* v. *California* (347 U.S. 165, at 174):

> We are not unmindful that hypothetical situations can be conjured shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is intended to preserve practical and substantial rights, not to maintain theories. *Davis* v. *Mills,* 194 US 451, 457, 48 L ed 1067, 1071, 24 S Ct 692.

It is not clear from the language in *Katz* just how far the Court meant to go in rejecting the protected area concept and to what extent it meant to accept the personal right theory. Just as nothing in *Katz* requires the Court to go all the way in its espousal of the protection of the person theory, nothing in that decision stands as an insuperable legalistic obstacle to the limitation of the *Katz* rule at any point within the gamut of privacy invading investigative devices which the Court feels is appropriate. Unless an arid conceptualism is to be the determinant of constitutional decision, the adjudicatory process must respond to the imperatives of practical necessity. It must weigh the necessity for constitutionalizing the subject of official wiretapping against the disadvantages, doctrinal and practical, to be apprehended from the Court's intervention in an area already well controlled by statute.

Katz need not be read as implying that wiretapping is within the governance of the Fourth Amendment simply because the majority opinion of Mr. Justice Stewart rejects the trespass test which had been approved in *Olmstead. Olmstead* was not expressly overruled in *Katz* and the mere fact that the *Katz* court did not accept the *Olmstead* trespass rationale does not mean that it would not sanction some other legalistic principle justifying the same result as that achieved by the *Olmstead* decision. This analysis derives confirmation from the realization that if this interpretation of *Katz* is not correct then, *Katz,* if it brings wiretapping within the scope of the Fourth Amendment, was authorizing wiretap interceptions pursuant to the approval of a court order of the type mandated in *Katz,* despite the fact that Section 605 (as interpreted in *Benanti* and re-interpreted after *Katz* in the *Lee* decision) prohibited all interceptions and divulgences of telephonic communications.

The practical considerations dictating such a limitation in the *Katz* rule are weighty indeed. If the *Katz* doctrine is not so confined, then it may be argued that the non-electronic overhearing of conversations between criminals talking confidentially in the street or at a secluded table in a public restaurant will be within the regulation of the Fourth Amendment and may proceed only under the permission of a warrant. More, the implication of an unlimited *Katz* rule would be that invasion of privacy by sight as well as by hearing is regulable by Fourth Amendment standards.

Formerly information learned by sight was only subject to the exclusionary rule of the Fourth Amendment where it was obtained by observations made during a trespass (see *U.S.* v. *Lee,* 274 U.S. 559, 563; *On Lee* v. *U.S.,* 343 U.S. 747, 754; *McDonald* v. *U.S.,* 355 U.S. 451). Since *Katz* seems to have eliminated the trespass requirement, an intrusion on privacy effected by looking through the window of a home while standing on a public sidewalk might be considered within the control of the Fourth Amendment.

In other words, if the conceptual underpinning of *Katz* is viewed as a right of personal privacy as against privacy-invading investigative devices, it may seem to lower courts that there is no logical reason why *Katz* could not be invoked to condemn all of the many police practices that involve non-trespassory invasions of privacy, *e.g.*, non-electronic eavesdropping, electronic eavesdropping not involving physical contact, shadowing of suspects, visual observation with or without the use of binoculars, telescopes or other visual aids, non-trespassory stake-outs of premises in which criminal enterprises are being organized, informer intelligence not based on voluntary disclosures by the suspect, etc.

In many situations where the police conduct non-trespassory eavesdropping (either with or without electronic aids) on conversations between criminal conspirators or, *e.g.*, between one engaging in criminal distribution of narcotics and his distributee, the conversants believe that their conversation is unheard by others, as did the conversant in the phone booth in *Katz.* Similarly, in cases where the police use binoculars, telescopes or search lights to gain a visual observation of something they could not otherwise see, or peer unobtrusively into a window, with or without visual aids, under circumstances not involving a trespass on the curtilage or protected area of private property, the wrongdoer sighted is usually secure in a not unreasonable belief that his criminal activities are not being observed. In these cases, that which is seen or heard would not have occurred if it was known that someone was hearing or observing it.

Thus if the *Katz* rule is not limited as here suggested, and, instead, is extended to include wiretaps, it would also seem applicable in principle to these other forms of investigation since it can be argued that there is reasonable reliance upon a presumption of privacy by the persons investigated in these circumstances just as there was by the conversant who relied upon the privacy of the telephone booth in *Katz.*

Such might be the theoretical implications of a holding that the Fourth Amendment's regulatory reach is not restricted to seized tangible objects and is not predicated upon some physical contact with a protected area.

It is for this reason that it is respectfully urged that this Court quiet all doubts as to the legitimacy of traditional investigative devices by circumscribing the breadth of the *Katz* precedent.

Unless the Court adopts the approach here urged upon it, a precedent may be established in this case which requires police officers to make a showing of probable cause and to obtain a warrant before employing any investigative device which infringes personal privacy. Even if this Court should not hold to this effect in so many words, the doctrinal implications of its holding may be viewed by state and lower federal courts as compelling them to rule inadmissible all evidence obtained by privacy-invading investigative devices without the permission of a warrant valid under the standards of the Fourth Amendment.

And its holding may exercise a constraining effect on the activities of law enforcement officers mindful of the possibility that they may be subject to civil suit or criminal prosecution under the federal Civil Rights Laws for invasion of privacy. (See 42 USC 1983, 1985, *Monroe* v. *Pape,* 365 U.S. 167, and *York* v. *Story,* 324 F. 2d 450, 9th Cir., cert. den. 376 U.S. 939, 964, concerning civil suits, and 18 U.S.C. 241, 242, *U.S.* v. *Price,* 383 U.S. 787, and *U.S.* v. *Guest,* 383 U.S. 745, concerning criminal prosecution.) The effects of such a holding on the already low morale of police throughout this country may lead to widespread cynicism in the police establishment concerning the obligation to respect this Court's decisions, an increasing official diffidence and a flagging of enforcement energies side by side with an expanding tendency toward tolerance of extra-legal law enforcement.

Indeed, if the Court's decision in this case should be susceptible of the interpretation that the Fourth Amendment protects personal privacy against privacy-invading inestigative techniques, it is far from unlikely that it may encourage a massive outpouring of damage suits or injunction actions based upon the Fourth and Fourteenth Amendments against federal, state and local governments and officials for every conceivable invasion of personal interests which are vaguely classified under the concept of privacy. That suits founded directly on these Amendments themselves, or on federal Civil Rights Laws implementing them, may not have occurred in volume before is no guarantee that they will not occur in the future, in view of the expanding trend of anti-police militancy which is sweeping the nation. It is conceivable that such Amendments might be invoked by suitors to supplement limited tort categories and avoid governmental immunity laws.

Such a constitutional regime would deal a fatal blow to law enforcement. This Court may judicially notice (*Dennis* v. *United States,* 341 U.S. 494; *Brown* v. *Bd. of Ed.,* 347 U.S. 483) that most of the investigative devices specified above are often employed at a time when there is not sufficient evidence of crime to enable a showing of probable cause.

Indeed, devices such as shadowing and visual observation are employed in order that the police may gather sufficient evidence to enable them to procure a search warrant. Obviously, at the beginning of an investigation, evidence amounting to probable cause does not exist and if it is insisted that no investigation may begin until such a quantum of evidence has been obtained, it will not be possible to conduct any investigation at all.

It would be impossible under such a system to deal effectively with organized crime. Wiretapping, electronic surveillance (see The Challenge of Crime in a Free Society, a report by The President's Commission on Law Enforcement and Administration of Justice, pp. 201, 203) and such other investigative procedures as shadowing, non-electronic eavesdropping and informer intelligence (see Harvey and

Cross, The Informant in Law Enforcement—1960) are absolutely indispensible in law enforcement's efforts to bring to justice the higher-ups in organized crime enterprises. Even assuming, as the majority opinion in *Katz* indicates, that *Katz* does not reject the Hoffa-Lewis approach permitting participant monitoring or party recordation or the testimony of an informer as to admissions made to him, it may, if interpreted broadly, prohibit informer evidence obtained by stealth and without the coöperation of the suspect.

In his concurring opinion, Mr. Justice Harlan seeks to limit the *Katz* doctrine so as to retain the protected area concept while eliminating the physical intrusion requirement. It is not certain whether this concurring opinion fully renders the legalistic purport of *Katz*. If it does, it would appear that the *Katz* rationale excludes wiretapping from the purview of its doctrine.

Justice Harlan's opinion (19 L. ed. 2d at pages 587-588) declares in part:

> "I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, and unlike a field, Hester v. United States, 265 US 57, 68 L ed 898, 44 S Ct 445, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; * * * Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

> The critical fact in this case is that '[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume' that his conversation is not being intercepted. Ante, p. 582. The point is not that the booth is 'accessible to the public' at other times, ante, p. 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v. United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431."

Justice Harlan's opinion seems to say that the protection of the Fourth Amendment only attaches to a person subjected to official eavesdropping when he is in an enclosed place that is, at that moment, private, and that although the eavesdrop equipment need not penetrate that place *physically,* it must do so *electronically* before the Fourth Amendment is offended. Since the conversant can not place himself inside of a telephone line and since a wiretap eavesdrops on that line and not on the place where the talker is located, it would appear, under Justice Harlan's interpretation of the *Katz* holding, that wiretapping is not within the regulation of the Fourth Amendment. In a footnote, however (at 19 L.ed. 2d, on page 588), Justice Harlan opines that the course of development culminating in *Katz* must be recognized as overruling *Olmstead,* so the matter is afflicted with uncertainty. It may be that Justice Harlan is only suggesting that the trespass doctrine of *Olmstead* has been rejected rather than its holding that wiretapping is not within the regulation of the Fourth Amendment.

In any case, Justice Harlan's approach would appear to extend the scope of *Katz* farther than this respondent suggests. It is respectfully submitted that Justice Harlan's formulation, though reflecting superior insight and a high respect for the values of federalism, might still entail practical disadvantages. The doctrine he approves could be used to protect from warrantless eavesdropping, persons conversing briefly in secluded corners in public places or restaurants in low tones audible to electronic surveillance equipment or to an eavesdropper hidden behind a post or curtain, since an expectation of privacy in such circumstances might be viewed as reasonable. Conversations of this kind are frequently encountered in law enforcement. They are over so quickly that there is not time to get an eavesdrop order and often there is not sufficient evidence to make a showing of probable cause. They may be eavesdropped with the aid of the parabolic "mike" and other modern equipment.

It is urged that the physical contact theory expounded in this section by respondent would exercise less restraining effect on law enforcement. Control by this Court over electronic surveillance is not necessary. It has already been subjected to regulation by federal and state governments. Moreover, the police are not interested in abusing their investigative powers by employing electronic surveillance in situations where it serves no law enforcement needs. Budgetary and time limitations mitigate against this, as is shown in the discussion in the last Point in this Brief. The pressures of police work do not admit of idle snooping.

The crucial policy need is that private electronic eavesdropping be stopped and that is an objective beyond the power of this Court to achieve. It is believed that the recent federal and state legislation on the subject has dealt with it effectively and that this Court should not, out of an understandable concern about official eavesdropping, propound a restrictive doctrine which further narrows the prerogatives of those who protect society from evil.

If this Court places its imprimatur of approval upon a broad Fourth Amendment principle of privacy, there may, as a consequence, be visited upon the American system of criminal justice tasks and burdens beyond its capacity to assume. For example, if the doctrine should gain currency that every privacy-invading investigative technique must be legitimized by the warrant procedure of the Fourth Amendment, it would follow that extensive pre-trial motions and hearings to test the legality of such devices will be required in every state and federal criminal case.

The added burdens thus imposed on state and federal judicial apparatus might result in a break-down of law enforcement. Collapse could confidently be predicted in urban areas such as New York City and its environs, where dramatic increase in criminal motion calendars has overburdened limited judicial personnel and has contributed to calendar congestion and serious delays in the trial of major felony cases. There are instances in which felons awaiting trial have been lodged in jail for as long as one year prior to trial because they were financially unable to make bail. The imposition of further burdens upon urban systems of criminal justice will only compound this unfortunate state of affairs.

Moreover, the proliferating nuances of an expanded right of privacy would provide innumerable additional grounds for federal habeas corpus relief and would result in the enormous burdens on the federal court system arising from burgeoning attempts to vacate state criminal convictions in federal tribunals. While the rational response to such problems might be an expansion in the judicial establishment and in the personnel of the courts and prosecutory agencies, political and financial realities suggest that timely reform is unlikely. Such considerations have been recognized as relevant in the process of constitutional adjudication (See: *People* v. *Letterio,* 16 N.Y. 2d 307).

In the light of the above analysis, it may be seen that the practical consequences flowing from the establishment of an investigative right of privacy are more than the social traffic will bear and involve great dangers to the orderly functioning of American society and those judicial and law enforcement processes which form its indispensable basis. If this Court should apply the *Katz* doctrine so as to hold, in effect, or to imply that the Fourth Amendment does not merely safeguard protected areas, but, more, preserves the privacy of the accused as against privacy invading investigative techniques, the Fourth Amendment's protective dimension would be enlarged far beyond traditional boundaries and the rule of *standing,* which is still recognized in this Court's Fourth Amendment jurisprudence, albeit, in somewhat relaxed form, might fall by implication. Such a result would follow if the doctrinal underpinning of the Court's decision was an avowedly broad conception of Fourth Amendment privacy.

Thus if the Court defined privacy in the Fourth Amendment context in unlimited or comprehensive terms, lower courts, state and federal, might, by a bold course of inference, deduce the conceptual consequences of the Court's full-blown statement as protecting from official invasion not only the physical person of the accused, any area in which he is located and any projection of his voice but also any other expression or emanation of his personality or person which was intended to be private, such as inculpatory writings or pictures of himself or any possession which he had placed in such circumstances as reasonably to indicate an intention to preserve it in a condition of privacy.

That such might be the results of a magisterial pronouncement of doctrine which aggrandizes to the limit the regulatory grasp of the Fourth Amendment is suggested by the fact that the common law of various states has protected a wide spectrum of interests under the rubric of privacy. These interests include the right to insist that one's artistic and literary creations (See: Prosser, Privacy 48 Cal. Law Review p. 383, 401-7), recorded emanations of one's person such as photographs (*Pavesich* v. *New England Ins. Co.,* 122 Ga. 190, 50 SE 68) films (*Melvin* v. *Reid,* 112 Cal. App. 284, 297 P. 91) and one's property (See: Prosser, Privacy, 48 Cal. Law Review 383, 392-8) remain inviolate against the intrusion of public attention.

If the Court's theoretical framework conceives of the Fourth Amendment as guaranteeing all individual privacy against official investigative efforts, facile analogies to tort rules of privacy might impel some state and federal courts to declare e.g. that written evidence of the fruits of crime buried by the accused in a forest or secreted on someone else's property could not be obtained by police without a warrant and that the accused had standing to raise Fourth Amendment questions concerning search and seizure under such conditions.

Situations such as these are frequent in law enforcement, and if it should be held that they are within the control of the Fourth Amendment, the consequent requirement of obtaining a warrant will impose heavy additional burdens on courts and law enforcement agencies. If the scope of the Warrant clause is extended so radically as to require a warrant for every type of privacy invading investigative device and in every situation where evidence has been secreted or kept from general attention by the accused, the law enforcement function will be rendered impotent.

If the personal privacy interpretation of the Fourth Amendment gains currency, and if the diverse interests subsumed at one time or another under the right of privacy in private law should be assimilated into the lower court jurisprudence of the Fourth Amendment, it might well result in the abrogation of the traditional principle that the Fourth Amendment regulates only official conduct. For example, if the concept recognized in some jurisdictions (e.g., *Baker* v. *Libbie*, 210 Mass. 599, 97 NE 109) that there is a right to prevent publication of private papers should be absorbed into a broad right of privacy protected by the Fourth Amendment, it would follow that official use of such evidence might be prohibited where the evidence was obtained by a private person necessarily without the authorization of a warrant and without official complicity and accepted by the police. Such a result would be in accord with the principle sometimes recognized in private law barring the use of such material by a blameless transferee. (See *United States* v. *Fleming*, 69F Supp. 252.)

Nor may it be assumed with confidence that Courts will not decree such a regime of unreason. The catalytic effects of this Court's decisions produce results beyond its intentions. Case by case adjudication rarely moves to the guidance of a presiding forevision. As it transacts its narrow and transitory concerns, it proceeds by short and unknowing steps toward a goal unseen. Its theatre is the restricted context, its object impromptu adjustment, its selective focus the special instance rather than the panoramic insight. It goes forward in ignorance of its ultimate destination or the total effect of its separate acts of judgment. It is only when its career has run its course that the mystery of its larger significance is dispelled.

It is respectfully submitted that the Court will not necessarily obviate these dangers by a limited exercise in legalistic innovation which carefully circumscribes the extent of its reach. Even if this Court should opt for a small advance in doctrine, even if it should stop short of extremism, its step along the path will not be the last. The goal which it regards as marking the limits of the possible may simply provide the point of departure for a successor Court, so that, by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement.

Constitutional history records that expansions in freedom are but preparations for further expansions, that, except in times of war or external peril, our constitutional system is not impartially responsive to the values of liberty and order and is only adjustable in the direction of broader individual rights in the field of criminal procedure.

In the end, this steady attrition of official competence may produce a fundamental alteration in the balance of social forces, such that extra-legal power will no longer wear the aspect of the transient and eccentric, but rather will stand forth as a virulent and ineradicable feature of a permanently flawed society.

Katz may, without unwelcome practical result, be so limited as to exclude from the coverage of the Fourth Amendment wiretapping which does not involve physical contact with the structure in which the eavesdropped conversation is occurring. Most wiretapping does not involve such contact, nor was there such contact in this case (A.117-120, 141; pages 18-21, Brief for Petitioner). Since official wiretapping, state and federal, is now strictly controlled by the Safe Streets Act, and, in addition, by State laws (see enumeration of state statutory provisions in 68 Columbia L. Rev. #2, page 207), protection of privacy will not be sacrificed by such a holding.

C. The attempt to justify the extension of the Fourth Amendment's coverage to include telephonic privacy by recourse to the alleged inherent purpose or underlying values of that Amendment is a questionable exercise.

Petitioner seeks a more ambitious statement of doctrine from this Court than that recommended by Respondent.

There is a method of judicial decision which is activist in character and which views the process of constitutional adjudication as that crucial exercise which effects a continual renewal of our constitutional tradition by the tactic of judicial amendment. It is this tactic which petitioner seeks to call into operation. Some commentators have sought to sustain the judicial expansion of constitutional guarantees with a justifying ideology which takes as its central principle some such standard as the "essential nature" or "implicit purpose" of the guarantee under consideration. Such standards, are, however, the product of a rather questionable intellectual method. It consists of taking the restricted values recognized in constitutional language and expanding them far beyond the boundaries contrived by the draftsmen of the Constitution.

Thus, for example, some observers, ignoring the special evils which the Framers had in view in composing the Fourth Amendment, have sought to generalize from the limited right of personal and domiciliary repose to which the language of the Fourth Amendment was limited so as to argue that the Amendment's "purpose" was to protect privacy.

However, neither textual phraseology nor constitutional history discloses any such purpose. *Indeed, such a vague animus, even if it was reflected in the deliberations of the Framers, would hardly constitute a coherent "purpose" at all, since its surpassing indefiniteness and the inherent ambiguity of the concept of privacy make it an unsuitable guide to a judicial process obligated to define the precise contours of enforceable rights.*

The vague concept of "privacy" has been applied to a wide variety of dissimilar situations and values and to argue that the Fourth Amendment's "purpose" was the protection of privacy is to tell us nothing about what types of specific rights are within the limits of its teleology.

Some authorities have viewed the so-called right of privacy as a philosophical or sociological generality without sufficient precision to be enforced as a legal right. (See: Davis, What Do We Mean by the Right to Privacy? 4 SDL Rev. 1.)

To contend that the Fourth Amendment celebrates so vague and inchoate a conception is to read into that Amendment an idea which is not expressed in its language and to falsify the intent of the Framers, who drafted the Fourth Amendment to deal with specific evils (*e.g.*, the use of the vague general warrant or writ of assistance by excise inspectors to effect clamorous entrance into the homes of law-abiding citizens and to seize their property). The obligation of this Court to respect the intent of the Framers has been most eloquently argued by one of its own members, Mr. Justice Sutherland (in *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 448).

It is clear that the Fourth Amendment was a restricted exercise in problem solving, not a lofty expression of social philosophy, and to infuse it with a broader purpose is no more justified than would be a reading of the First Amendment, *e.g.*, which holds invalid a local ordinance providing for municipal festivals on the theory that the noise entailed in such proceedings will, to some extent, inhibit that free flow of ideas which is the "purpose" of the First Amendment.

The vagueness of the right of privacy concept is partially attributable to the fact that it has been used as a conceptual catchall to describe so many different types of social interests. Also, the concept is infected with a zone of uncertainty owing to the fact that it has not been brought to that state of articulation where it gives clear indication as to what configurations of social fact are situations of privacy within its meaning and what type and degree of invasion of a situation of privacy amounts to a legally actionable encroachment upon the interests protected by the concept. Indeed, no exhaustive identification has been made of the full range of special interests protected within the right of privacy concept, and although special rights of privacy have been elaborated by the ad hoc process of judicial decision, primarily in the field of torts, it is impossible to draw from the doctrinal apparatus of the cases the organizing insight which declares the conceptual essence of the general right of privacy. (This matter is discussed in some detail in the portion of this brief dealing with the right of privacy claim founded on the Fourteenth Amendment.)

The adjudicatory process has, at various times, given legal recognition to privacy of personality which protects from disclosure or exploitation the name, appearance or other aspects of the person, and the facts and circumstances of his personal life. It has also conferred the benefit of its protection on various types of confidential information, such as census data, financial intelligence, income tax information, etc.

It has further recognized the legal claims of special confidential relationships and the special privileges of confidentiality deducible from such relationships.

It has recognized the legal right to security against heinous intrusions of the physical person, unwarranted invasions with respect to papers and other possessions, property and artistic products. And this enumeration is far from exhaustive. (For an inventory of the States which have recognized the tort action for invasion of the interest in privacy, see Prosser, Torts, Sec. 112, 3rd Ed. 1964.) As may be seen, these forms of action involve distinct types of interests.

Thus when it is argued that it is the "purpose" of the Fourth Amendment to protect privacy, we do not really know that is meant by that assertion in concrete terms.

It is true that the tort concept of negligence is also vague, but at least its application in adjudicative contexts is restricted by recourse to the guidance of the reasonable man standard, and, in any event, is administered by State common law courts charged by a long tradition with the duty of policy making. For a constitutional court to fashion such a role for itself is totally inconsistent with its obligation to expound a written Charter. Moreover, it is one thing for a tribunal to administer a concept given the explicit sanction of law. It is another for the guardians of our fundamental law to import into its written embodiment a "purpose" so vague as to justify a virtual rewriting of it. That would appear to be what petitioner asks this Court to do.

Such a technique as that impliedly contended for by petitioner can be used to expand every constitutional guarantee far beyond the limits suggested by its language and history. Moreover, a regime of constitutional adjudication which rejects the relatively definite and objective standards inherent in constitutional language and history must necessarily be a continuing exercise in subjectivity since the vague "purposes" accepted as the determinants of decision-making leave discretion at large and vulnerable to the personal preferences of the judicial tribunal pronouncing judgment, however high minded it may be.

Nor can such an exercise in judicial creativity be justified by a resort to speculations as to how the Framers would react to modern conditions. We can never know how they would react. They might be so impressed with the growing threat of crime as to reject all proposals for expanding constitutional guarantees in such a way as to burden the process of law enforcement. They were, after all, essentially conservative people, mindful of the values of law observance and public tranquility. So far as history tells us anything at all about the motivations of our constitutional fathers, it tells us that the Framers and Adopters of the Fourth Amendment were concerned to protect domiciliary repose and the sanctity of person and property as against arbitrary seizure and not the subtle condition of privacy.

Patrick Henry insisted on the necessity of adopting a Bill of Rights in order to prevent such invasions. He declared "excisemen may come in multitudes; for the limitation of their numbers no man knows. . . . They may . . . search, ransack, and measure, everything you eat, drink and wear . . . any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason" (3 Eliot Debates, 448-49, 588).

Professor Kenneth Davis has remarked that such invasions under "the odious writs of assistance . . . helped ignite the fire of the American Revolution" (Davis, Administrative Law Treatise, 231-232).

When the Fourth Amendment is analyzed in terms of the conditions of its genesis, the inference is inescapable that suitors such as petitioner, who justify a broad reading of the Fourth Amendment on grounds of "purpose" and who contend for an absolute view of constitutional rights, are more interested in enforcing their own constitutional ideologies than in respecting the provisions of our fundamental law.

The Fourth Amendment is obviously the product of certain traumatic social experiences which galvanized public attention and focused it narrowly on the questions of specific abuse and specific remedy. The Fourth Amendment is a provision which had its inception amid the stress of special circumstances. Its plain language bespeaks the limited character of its objectives. To convert it from an *ad hoc* vehicle to an abstract principle is to ignore that exegetic ordinance which makes textual meaning the determinant of constitutional adjudication. (With regard to the obligatory character of constitutional rhetoric, see Merrill, Constitutional Interpretation: The Obligation to Respect the Text, in Perspectives of Law: Essays for Austin Wakeman Scott, page 261–1964.)

The Fourth Amendment is not a privacy law. In its objective meaning, it is aimed at preventing overzealous officials from unreasonably seizing property or persons and doing it by clamorous and obstreperous invasion of house or person. In this sense it aims at making the citizen master in his own home. It was not designed to secure privacy of the type demanded by advocates of telephone privacy. The type of personal and domiciliary repose sought to be guaranteed by the Fourth Amendment, if it be called "privacy", is not the same type of interest sought to be vindicated under the claim that telephonic communication should be conducted without being overheard. It is significant that the practice of non-electronic official eavesdropping was known to the Founding Fathers, as Justice Black has suggested, but they did not seek to bar it in the Fourth Amendment or elsewhere because it was not this subtle type of privacy—invading activity that they were concerned to prevent. Thus to say that the Fourth Amendment's essential or implicit purpose was "privacy", does not justify the extension of its regulatory ambit to wiretapping on the theory that its purpose is to protect all of the myriad and distinct interests classified under the vague term "privacy" at one time or another in our history.

D. It is respectfully submitted that official wiretapping should not be constitutionalized.

It is respectfully submitted that this Court should not declare wiretapping to be regulated by the Fourth Amendment, because to constitutionalize this subject is to remove it from the control of the legislative power, to foreclose all future experiment and to prevent the people from dealing with it in accordance with emerging knowledge, changing needs and an altering balance of interests. As experience with the Safe Streets Act increases, it may appear that certain changes in the wiretap procedures mandated in that Act are necessary in order to improve the effectiveness of law enforcement in the area of organized crime. Moreover, the public, balancing the relevant interests, may decide that the growing threat which organized crime poses to our social health necessitates some adjustment in official wiretap procedures.

Such an appraisal may also be reinforced by a change in public values which places less emphasis on the importance of telephonic privacy. That value is not necessarily immutable or as lasting in its vitality, as *e.g.*, marital privacy. The telephone is, after all, not sacrosanct. In some circles, a whole mythology has grown up around this rather mundane little device, investing it with almost quasi-religious significance, but it is no more a proper subject for canonization than other instruments of social life.

Under the general intent of our constitutional scheme and the provision of the Tenth Amendment, the power of decision regarding this subject rests with the people acting through their legislative representatives. It is not the design of our constitutional scheme that the Fourth, Ninth or Fourteenth Amendments should be employed to remove such important matters of policy from the domain of popular control.

POINT II

If the Court should hold that wiretapping is regulated by the Fourth Amendment, it is respectfully submitted that it should find the wiretap evidence here in issue not violative of the Fourth Amendment.

A. The telephone conversations herein did not occur in a situation of privacy and thus were not eligible for protection under the *Katz* rule even if wiretapping were within the regulatory ambit of the Fourth Amendment.

The telephone conversations herein did not occur in a situation of privacy within the definition of *Katz,* and thus would not be entitled to the protection of the Fourth Amendment even if wiretapping were within the regulatory scope of that Amendment.

In *Katz,* this Court held that the conversant in the telephone booth who shuts the door behind him is entitled to assume that his conversation will be private. But the Court made it clear that "What a person knowingly exposed to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . ." (19 L.ed. 2d at page 582).

Tested by this criterion, it seems clear that petitioner's telephone conversations were not entitled to protection.

The two conversations in question had occurred between petitioner, speaking from an outside phone, and co-conspirator Dino Conte, speaking from the phone at the Headline Bar. The telephone tapped at the Headline Bar was not in a coin booth. Furthermore, the telephone line at the Headline Bar had an extension and two portable phones (A.116; page 18, Brief for petitioner). Since petitioner "occasionally helped at the Bar on week-ends" (p. 36, Brief for petitioner; R 1187, 1889) he certainly knew the nature of the telephone arrangement at the Headline Bar. It follows that he must have been aware that his telephone calls to the Headline Bar could have been overheard on the extension or partially overheard by patrons standing near the telephone.

Thus the telephone conversations in question were not undertaken by petitioner under such circumstances as would reasonably entitle him to assume that they were private. In other words, it cannot be said that petitioner "justifiably relied" on an assumption of privacy, as did *Katz* in the privacy of his phone booth.

Moreover, since the objective conditions did not amount to a situation of privacy, it matters not whether petitioner relied on an assumption of privacy or whether the assumption was reasonable.

At the very least it may be said that petitioner has not discharged his burden of demonstration by presenting to this Court a factual record unambiguously disclosing an unjustified invasion of his constitutional rights.

A different holding in this case would provide a doctrinal justification for the claim that all privacy invading investigative devices are governed by Fourth Amendment standards.

B. If the *Berger-Katz* criteria are applied retroactively to this case, and it is respectfully urged that they should not be, then those criteria should not be enforced in their full rigor and the Court should be content with that appropriate degree of compliance which may be exacted without destroying the effectiveness of the wiretap investigative device.

It should be noted at the outset that petitioner did not raise in his appellant's brief in the New York Court of Appeals questions as to whether the wiretap order in question was supported by a showing of probable cause and whether it complied with Fourth Amendment criteria. His arguments regarding the Fourth Amendment were the different ones that (1) *Berger* required an authorizing warrant for official wiretapping; (2) *Berger* had struck down 813-a, leaving no statutory basis for the order, since the statute was thus void *ab initio*; (3) Section 605 broadened the enclave of privacy protected in the Fourth Amendment; (4) the *Mapp* exclusionary rule was applicable to wiretap evidence obtained in violation of 605.

It is true that the Court of Appeals considered the question of whether the order herein complied with the Fourth Amendment criteria mandated in *Berger* and found substantial compliance but it did not really address itself to the probable cause issue other than to declare in passing that probable cause had been shown. It is established beyond the need of citation that this Court will not consider issues not properly raised in the Court below, and although this rule is sometimes relaxed where such issues have been dealt with although not properly raised, this Court must decide whether the record herein discloses an occasion justifying a pronouncement on all of the issues pressed upon it by petitioner.

If this Court should decide that wiretapping is controlled by the Fourth Amendment and that the issues sought to be asserted by petitioner were properly raised below, and may be raised here, it will still not be necessary for it to enforce all of the warrant criteria of that Amendment in their full rigor. (See: The Right of the People to be Secure: The Developing Role of the Search Warrant, N.Y.U. Law Rev., Vol. 42, #6, Dec., 1967, p. 1131; see also: 52 Cornell L.Q., #6, p. 1000.)

This Court's recent holding in the administrative search case of *Camara* v. *Municipal Court* (387 U.S. 523) is justification for a relaxation of the warrant procedure in an area of investigation where full compliance would be difficult. Indeed, the unreasonable search concept reflected in the Fourth Amendment suggests the propriety of a flexible approach.

It is argued in the next section of this Point that the procedures followed in this case were substantially in accord with those mandated in *Berger* and *Katz*. However, even if it be assumed, *arguendo*, that these procedures departed to some extent from the catalog of requirements ordained in *Berger* and *Katz*, they should still be held adequate under the rationale of the *Camara* decision.

By the very nature of the wiretapping process, it may be impossible for a warrant authorizing it to comply fully with each Fourth Amendment warrant criterion, especially that concerning particularity. These criteria are more easily adaptable to electronic eavesdropping not involving wiretapping, since it is sometimes the case that such electronic surveillance is designed to record a particular conversation, the exact nature of which is known in advance (*e.g.*, between two persons in a face to face encounter, as in *Osborn*, or the conversation of a particular conversant, as in *Katz*).

In *Katz*, this Court seemed to relax the notice and automatic termination requirements enunciated in *Berger*. A continuation of this common sense approach is necessary if wiretapping is not to be restricted so seriously so as to compromise its effectiveness and usability as an investigative tool.

While the present federal statute may seem open to improvement in this regard, it can be revised in the light of future experience, although it may be gathered from the present climate of legislative opinion that it will continue to retain substantial safeguards.

If this Court should hold wiretapping to be within the regulation of the Fourth Amendment and should apply the *Berger-Katz* criteria retroactively, the crucial question before it would concern the validity of the wiretapping in this case and whether petitioner has standing to attack the wiretap order in this Court, and not the constitutionality of the eavesdrop statute under which it was obtained. It is true that, in *Berger,* this Court went beyond the eavesdrop order, since it apparently felt it necessary to strike down the challenged statute on its face with respect to that portion of it authorizing trespassory eavesdropping. Presumably, the Court was actuated by the desire to nullify the regulatory effect of the statute in one comprehensive invalidating act, rather than to do it by examining the application of the statute in numerous particular cases and by inspecting orders on a case to case basis.

But this comprehensive approach is no longer necessary since the statute, Sec. 813-a of the Code of Criminal Procedure, does not exist, having been replaced by a new statute enacting *Berger*-type criteria. Thus it is respondent's view that the validity of 813-a and the question of whether the Order herein was obtained under a valid statute are matters of state law and not substantial federal questions. In other words, the question of whether the order was obtained pursuant to a state law or under the authorization contained in Article 1, Section 12 of the New York Constitution or under the inherent power of the issuing judge (which inherent power would seem to have been recognized in *Osborn* v. *United States*) are simply not questions of federal constitutional proportions.

With respect to the requirement of particularity, it is impossible in a wiretapping context to predict the exact content of the conversations to be overheard. However, prior decisions of this Court indicate that the particularity requirement is a flexible one (compare *Stanford* v. *Texas*, 379 U.S. 476, with *Steele* v. *United States*, No. 1, 267 U.S. 498, 504). The description provided in this case in the order was supplemented by the oral testimony before the issuing judge of Assistant District Attorney Norman Levy.

Under the law of New York, such oral testimony forms part of the wiretap order (*People* v. *McCall*, 17 N.Y. 2d 152), as the Court of Appeals noted in this case. The wiretap papers, taken together with the oral testimony, specifically named certain persons whose conversations were to be overheard, specified the crimes in which they were involved (attempted extortion, conspiracy, coercion, the communication of threats of physical violence to the daughter of the person who was the object of the extortion and assault upon his wife), and indicated the particular subject of the conversations by describing the particular crimes about which evidence was sought. (See discussion on this topic in next section of this Point.)

This degree of descriptive particularity was approved by this Court in *Osborn* v. *United States* (384 U.S. 323, 330), which was cited with approval in the *Berger* case (in 388 U.S., at 56-57). Such a degree of particularity would be sufficient to prevent investigative "fishing expeditions" since it would require a showing before a magistrate that conversations concerning specified crimes were likely to take place. Moreover, by the nature of the situation in *Osborn*, the authorities were able to describe the prospective conversation to be overheard with greater particularity than is normally the case in the wiretap context, because the person making the affidavit in support of the court order was the very one who was to participate in the conversation intended to be overheard and was thus able to specify in advance what he intended to talk about.

Since such specifity is more frequently possible in non-wiretapping eavesdrop situations (especially, those like *Osborn*, involving participant monitoring), than it is in wiretap contexts, it is respectfully urged that a more relaxed standard should be applied with respect to wiretap interceptions, assuming, *arguendo*, but not conceding, that wiretapping is within the governance of the Fourth Amendment.

Petitioner has argued that wiretapping is objectionable, and should be banned, because it permits *indiscriminate* seizure of evidence other than that specified in the order. However, it should be pointed out that the same objection may be made concerning a search and seizure. Even though a search warrant may provide that only specifically named objects may be seized, it is still a fact that once the privacy of the dwelling house is invaded by the searching officers they may examine and make notes concerning all of the belongings and property in the premises being searched, just as the wiretapping officer hears everything being said on the wiretapped telephone line.

The extent of the examination of private effects, especially in searches of offices, may be formidable (see Standards Relating to Electronic Surveillance, ABA Project on Minimum Standards for Criminal Justice, p. 89). Also indiscriminate invasion of privacy by subpoena duces tecum is permitted by law (*e.g.*, *Brown* v. *United States*, 276 U.S. 134, which upheld a subpoena providing for production of all communications between January 1, 1922 and June 15, 1925 concerning the manufacture and sale of eighteen different types of items).

Indeed, the Courts have recognized that the searching officer may seize and use as evidence the fruits of other crimes or objects illegally possessed, so-called contraband, found during the course of his search, even though not described in the search warrant (*Zap* v. *United States*, 328 U.S. 624; *United States* v. *Howell*, 240 Fed. 2d 149; *United States* v. *Old Dominion*, 10 Fed. 2d 736; *United States* v.

Howard, 138 Fed. Sup. 376; *United States* v. *Eisner,* 297 Fed. 2d 595, 6th Cir., cert. den. 369 U.S. 859; *Johnson* v. *United States,* 293 Fed. 2d 539, D.C. Cir., cert. den. 375 U.S. 888; *California* v. *Hurst,* 325 Fed. 2d 891; *United States* v. *Barone,* 330 Fed. 2d 543; *Hester* v. *United States,* 265 U.S. 57).

It is submitted that a wiretap order would clearly be adequate if it described the conversations to be overheard in terms of the particular crimes being investigated.

While the insistence upon a high degree of particularity is of value in a search and seizure context as an effective limitation on wholesale and indiscriminate seizure, it is not a realistic and operative remedy in the wiretapping situation. The fact is that a wiretap interception picks up all conversations during the period in which it is conducted regardless of the degree of descriptive particularity in the wiretap order. The same comment is pertinent with respect to a claim that a wiretap order is too broad where it authorizes the interception and recording of the conversations of any and all persons using the phone identified in the order. Such an objection is lacking in force since even a wiretap order which limited its authorization to interception of the conversations of a few particular persons would not prevent interception of the conversations of all other persons conversing on the phone line in question. Thus an insistence on strict particularity in the description of the conversants within the scope of the order would serve no useful practical purpose. The argument that wiretap eavesdropping must restrict itself to the overhearing of particular conversations is simply another way of urging the untenable thesis that wiretapping is unconstitutional in its very nature and must be suppressed.

It is respectfully submitted that the *Berger* criteria are open to question in certain other respects.

This Court in *Berger* felt that an authorization for a two month period of eavesdropping was the equivalent of a series of intrusions pursuant to a single showing of probable cause. It is respectfully argued that the same objection might be leveled against some searches and seizures, especially those involving searches of warehouses and other installations that may require numerous entries on separate days during the authorized period of the warrant.

Moreover, it is urged that petitioner can not attack the order here in question on that basis. The period involved in the order was no concern of his because the wiretap was on a telephone in a public bar not owned by petitioner and was not on petitioner's telephone. Nor was petitioner present in the Headline Bar during these conversations (see *Jones* v. *United States*, 362 U.S. 257). Thus petitioner has no standing to raise this objection to the order. Even if he had such standing, substantial compliance should be sufficient as to him. Where the owner of the telephone is not the attacking party, the matter may be subjected to judicial regulation by providing that where the order is extended in length, only those conversations obtained within a permissible period may be received in evidence. This alternative means of control should be accepted as a substantial compliance in circumstances such as these.

With regard to the requirement of notice, with all due respect to this Court's pronouncements in *Ker* v. *California* (374 U.S. 23) and *Miller* v. *United States* (357 U.S. 301), the requirement of notice (which was developed by custom and common law and is nowhere mentioned in the Constitution) was designed to prevent the occurrence of unnecessary violence in connection with an official entry in the execution of a search. Since there is no such entry in a wiretap situation, this safeguard against violence is simply inappropriate there. (See remarks of Mr. Justice Stewart to the same effect in his majority opinion in *Katz* v. *United*

States, 19 L.ed. 2d 584, n. 16.) It would appear that *Katz* has dispensed with these requirements for notice and automatic termination.

It is also pertinent to observe that in Respondent's view petitioner should not be permitted to attack the order herein on the basis of these two criteria, since only the owner of the phone has standing to object on these grounds. In addition, it is obvious that notice is but a means of assuring the utter ineffectuality of the wiretapping investigative device, since a person who knows his conversation will be overheard is likely to refrain from incriminating statements and to warn other persons using his telephone to do likewise. (See *Katz* v. *United States,* 12 L.ed. 584, n. 16.) Also, it is Respondent's contention that *the overheard conversations were not seized when they were overheard but only, if at all, when they were used in Court.* Of this use, all the defendants had notice.

With respect to *Berger's* condemnation of the New York eavesdrop statute on the ground that it permitted a renewal without a new showing of probable cause, it is relevant to argue here as well that, petitioner, in his attack on the order here involved, has no standing to raise this question since the tap in question was not placed on his telephone. This conclusion is all the more pertinent in view of the fact that the order in this case *was not a renewal order.*

The *Berger* decision also held that the statute in question was deficient because it did not provide for a return on the order. But in determining the validity of the order in this case (as distinct from the statute) this fact is irrelevant, because the purpose of the return, as conceived in *Berger,* was that it would prevent the police from using "seized conversations of innocent as well as guilty parties". In attacking the order herein, petitioner has no standing to raise this objection since what could be done with respect to other persons has no bearing on whether his rights were violated. Moreover, it is well established throughout the country that the return is a ministerial act (*Rose* v. *United States,* 274 Fed. 531; *People* v. *Massee,* 38 Misc. 2d 403 N.Y.), and a failure to file a return does not void the warrant (*United States* v. *Gaitan,* 4 Fed. 2d 848). Defects in the return will not render the search unlawful (*Evans* v. *United States,* 242 Fed. 2d 535; *Rose* v. *United States, supra; People* v. *Massee, supra*).

With regard to Respondent's argument that the Fourth Amendment's standards should be relaxed with respect to eavesdropping, it is submitted that there is nothing in this approach which is inconsistent with Respondent's contention that the Fourth Amendment should be enforced in its literal meaning and not *judicially amended.* Respondent is simply arguing that if the Court *does* bring wiretapping within the control of the Fourth Amendment, then, with respect to a protected class of telephonic conversations which is not controlled by constitutional language (as are "houses, persons, papers and effects"), there is no bar to including within the Court's decision creating that new protected class, a provision that Fourth Amendment criteria shall not be enforced in their full extent where such rigorous enforcement would be inappropriate in a wiretap context.

C. The wiretap order and the manner of its execution were not violative of Fourth Amendment standards.

In Point III of his Brief, petitioner professes to discern certain constitutional infirmities in the proceedings culminating in the issuance of the wiretap order and in the manner in which that order was executed.

Petitioner argues that the testimony of Assistant District Attorney Levy in support of his application for the wiretap order was inadequate. Petitioner appears to concede that the testimony of Mr. Levy showed reasonable grounds to believe that the crime of extortion had been committed by Granello and Conte (see p. 68 of his Brief). However, petitioner insists that Mr. Levy failed to establish the additional element that the prospective wiretap interception would "uncover evidence of the alleged crime". (This issue was not raised in the Court below, as is indicated at the beginning of the previous section in this Point.) According to petitioner, "the testimony simply revealed that Granello had had telephone conversations with Holtzman, and that one of a number of telephones used by Granello was located in the Headline Club, a place where Granello would sometimes be. No firm or continuing connection of Granello with that telephone was shown . . ."

In response to this argument, it may be said that petitioner misunderstands the rule of probable cause. That rule does not require demonstration to a certainty. (See *Rugendorf* v. *United States,* 376 U.S. 528; *Brinegar* v. *United States,* 338 U.S. 160.) It requires only such a showing as would indicate to a reasonable man the likelihood that a prospective wiretap interception will yield evidence of crime. And in a doubtful case, a warrant should be sustained (*United States* v. *Ventresca,* 380 U.S. 102). If a prosecuting agency were able to make the showing petitioner envisages it would not need any wiretap evidence.

Certainly the facts adduced by Mr. Levy before the Court sustained this minimum burden of proof. The evidence presented by Mr. Levy showed that Dino Conte managed or hung out in the Headline Bar; that Granello and Conte told Holtzman to call Granello at the Headline Bar (A 28-33); that Holtzman called and spoke to Granello at the Headline Bar (A 33-35); (pp. 13-14, Brief for Petitioner); that the monitoring of telephone conversations between the prospective victim of the extortion plot, Holtzman, and Granello by Assistant District Attorney Levy and the police, at Holtzman's request, showed that Granello was involved in the extortion scheme concerning Holtzman and that Granello instructed Holtzman to call him at the Headline Bar.

Thus there was reasonable ground to believe that Granello and Conte would continue to use the bar in question as a headquarters and as a telephonic outlet with respect to the criminal enterprise in question. Mr. Levy's testimony showed that the offenses of attempted extortion, coercion and conspiracy were actually in progress, that one assault had occurred and others were imminent. His showing exceeded the proof supporting the order in *Osborn v. United States* (385 U.S. 322).

These facts concerning the Headline Bar, coupled with evidence of the crimes charged and the identity of some of the participants, was certainly enough to indicate to a reasonable mind that Granello and Conte were operating from the Headline Bar and using the telephones there in connection with a scheme of extortion. The mere fact that Holtzman should have been instructed by Granello and Conte to telephone Granello there is sufficient proof that the telephone line in the Headline Bar was being used in connection with the scheme of extortion. The petitioner's claim that Assistant District Attorney Levy should have also given specific evidence that the co-conspirators conversed with each other over the said telephone at the Headline Bar is unrealistic.

Any normal person would conclude in such circumstances that conversations over such telephones between co-conspirators in the scheme was a reasonable probability, and, as it happens, such an assumption was borne out by later events.

Petitioner also seems to couple his argument in this regard with the claim that there was no showing of exigent circumstances. As is indicated in the previous section in this Point, this Court, in *Katz*, seems to have dispensed with the notice requirement. In any case, it is clear that Mr. Levy's testimony amounted to a graphic demonstration of exigent circumstances. It showed that Holtzman had been subjected to an extortionate demand and that, in connection with that scheme of extortion, his wife had been beaten, he had been threatended with physical harm and his daughter had also been so threatened. It was vitally necessary that information be obtained as to the persons who assaulted Holtzman's wife and who made the telephone threat to his daughter in order that the safety of the Holtzman family might be assured. Indeed, it is difficult to conceive of a situation more dramatically afflicted with urgency, and it is not surprising that the Court of Appeals in this case found that exigent circumstances were present here.

Petitioner urges as a further ground of objection that the order was a general warrant since its effective period was sixty days. Petitioner also appears to echo the *Berger* rationale that such an authorized period permitted a series of intrusions. This "series of intrusions" argument has been dealt with in the preceding section in this Point. It may also be noted that the order in question was signed on July 1, 1964 and that the conversations in question were intercepted between 6:00 P.M., July 3, 1964, and 10:15 A.M., July 5, 1964. Therefore the order was only in actual effect for a period of less than four days. In view of Respondent's argument in the preceding section of this Point that even if *Berger-Katz* standards were to be applied to this case (and they should not be), those standards should be relaxed, it seems reasonable to urge that a wiretapping regime so brief and reasonable in character should be held a substantial compliance with those standards.

Petitioner also seems to object to the fact that the order authorized the interception not only of communications made by and to Granello and Conte, but also by and to other persons communicating over the telephone in question. In the preceding section of this Point, this argument is dealt with in some detail. It was necessary that the order provide to this effect because the interception in question would necessarily overhear all conversations on the phone in question, and, if some conversations were intercepted without authorization, the interceptors would be guilty of a violation of Section 738 of the Penal Law of the State of New York.

Petitioner also claims that the order in question did not provide for the making of a return and that, in fact, a return was not made. However, the Court of Appeals, in its opinion herein, while agreeing that the warrant did not provide for a return, declared that it presumed that a return was, in fact, made "since the Defendant did not argue otherwise . : ." (21 N.Y. 2d at p. 96-97). Petitioner's response on page 77 of his Brief in this Court to this statement by the Court of Appeals is simply that it did argue in its *reply brief that the order did not provide for a return*. However, that is not the same thing as arguing that a return was not, in fact, made. Moreover, it may well be that the Court of Appeals decided that the assertion of this point in the *reply brief* did not, in the circumstances of the appeal, adequately preserve it for review. Rule [illegible] of the Rules of the Court of Appeals (McKinney's New York Court Rules) indicates that the reply brief is confined to the function of replying to matter argued in the respondent's brief.

If reasonable state procedural requirements are not observed, this Court will decline review even where the highest State Court does not expressly declare that it has refused to decide a federal question on this ground (*Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 309; *Bailey* v. *Anderson,* 326 U.S. 203, 206-7).

Petitioner contends that no return was filed.

It is not true that no return was filed. A return was made to the defense counsel and the Judge prior to and during the trial.

Prior to the trial, a copy of the order, the affidavit, and in particular the sworn testimony of Assistant District

Attorney Norman Levy, upon which the order was based, were turned over to the defense counsel. Concededly, the Judge had his copy at all times.

Following study and deliberation, a long pre-trial wiretap hearing was held permitting the defense counsel a full and complete opportunity to be heard and the right to cross-examination.

At the trial the defense counsel had a verbatim typewritten copy of both taped conversations before the tapes were offered as evidence and details as to the various wiretaps were given by prosecution witness (A. 115-135).

It is submitted that a "return" was made to both petitioner and the trial judge, and that the return given was a substantial compliance with this Court's mandates. Further, the method of return did not prejudice the petitioner in any way and no prejudice has been suggested.

That a return might be made to someone other than the issuing judge or at a different time than usual is not of constitutional proportions (cf. *Osborn* v. *United States*, 385 U.S. 323).

Petitioner, on pages 78 to 79 of his Brief, advances the curious argument that "the seizure of the Petitioner's conversations was a part of a comprehensive plan in which Court orders were obtained pursuant to Section 813-a, authorizing the wiretapping of at least four telephones . . . at his trial, the petitioner was prevented from ascertaining the actual number of telephones which were wiretapped. . . . Prior to the argument of this case, we shall move this Court for an order directing the District Attorney of Nassau County to deliver to this Court, an inventory of all wiretap orders applied for, granted and implemented in the present case, as well as all of the actual tapes produced by wiretapping in this case."

Petitioner then states that the four wiretaps known to him were such a broad intrusion into the privacy of the public at large as to deprive the procedure of any semblance of due process.

It may be said in response to this strange objection that it is defeated by the elementary principle of standing. It is clear that petitioner has no standing to object to the validity of wiretap orders on telephones in which he has no proprietary interest and over which he has not conversed (*Goldstein* v. *United States,* 316 U.S. 114). Certain it is that the alleged "broad intrusion into the privacy of the public at large" is not a cognizable issue in this proceeding. While the interests of the public are a relevant factor in any regime of judicial statehmanship, they may not serve as a pretext for deciding a given controversy by an adjudication as to the rights of persons not before the Court. This Court does not sit to preside over such a domain of disorder. The judicial power having been confined in the Constitution to specific cases and controversies, the Court operates under the implied limitation that it may only decide those issues bearing on the rights of parties to the controversy before it.

POINT III

Even if Section 605 of the Federal Communications Act be viewed as barring the use of wiretap evidence in state criminal trials, that is not a valid ground for vacating the judgment of conviction in this case, because the recent enactment by Congress, after the granting of certiorari herein, of the Omnibus Crime Control and Safe Streets Act of 1968 abated and rendered inoperative the provisions of Section 605.

The provisions of 605 are not available to the petitioner herein because that section is no longer in force, having been repealed in June of 1968 by the enactment in Congress of the Safe Streets Act. Therefore under the doctrine propounded by this Court in *Hamm* v. *Rock Hill,* 379 U.S. 306, it follows that 605 abated and cannot validly be invoked as a ground for relief in this Court.

The rule articulated by this Court in *Hamm* v. *Rock Hill* is consistent with the long established practice of the common law. Its application in this case would have the sanction of practical reason as well as historic acceptance. For 34 years, it was the policy of the federal government and all of its agencies, judicial, legislative and executive, not to treat State wiretapping as violative of federal public policy (see discussion in the portion of this Brief concerning retroactivity) and thus it would offend the canons of reason for a federal court suddenly to reverse that policy now by enforcing 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

POINT IV

Even if it be assumed, *arguendo,* that the Fourth Amendment governs the use of wiretap evidence of the type here in issue, this Court should not give retroactive application to its decisions in the *Berger* and *Katz* cases so as to invalidate the judgment of conviction in this case. Further, the Court should not apply *Lee* v. *Florida* retroactively so as to reverse the conviction herein.

Even if this Court were disposed to bring the enterprise of wiretapping within the control of the Fourth Amendment, and even if it be assumed, *arguendo,* that 605 did not abate upon the enactment of the federal Safe Streets Act, it is respectfully submitted that this Court should not give retroactive application to its decisions in the *Berger, Katz* and *Lee* cases.

In *Linkletter* v. *Walker* (381 U.S. 618), *Tehan* v. *Shott* (382 U.S. 406) in 1966, *Johnson* v. *New Jersey* (384 U.S. 719) in 1966, and in *Stovall* v. *Denno* (388 U.S. 293) in 1967, this Court established as the ruling determinant respecting retroactivity the tri-partite standard of (1) reliance, (2) whether a retroactive application would remedy a defect in the fact-finding process and (3) whether retroactive application would create stresses upon the administration of justice.

Certainly the factor of reliance is present in the situation before the Court. . .

Both the wiretapping here in question, and the introduction of the wiretap evidence in the State criminal trial herein, occurred before the Court enunciated its decisions in *Berger, Katz* and *Lee.* Prior to these decisions, state law enforcement authorities in New York (and throughout the country) relied upon the existing state of this Court's Fourth Amendment jurisprudence, which established the so-called *Olmstead-Goldman-Silverman* rule that eavesdropping not involving a physical trespass or penetration did not raise Fourth Amendment questions. These authorities also relied upon the Court's decision in 1952 in *Schwartz* v. *Texas* (344 U.S. 199), reaffirmed in 1961 in *Pugach* v. *Dollinger* (365 U.S. 458), to the effect that 605 did not bar introduction of wiretap evidence in a State criminal trial.

They also relied upon this Court's 4 to 4 decision in *Stemmer* v. *New York* (336 U.S. 963) in 1949, Justice Jackson not participating. This decision affirmed per curiam a New York Court of Appeals per curiam decision which affirmed a conviction based on wiretap evidence. This Court's *Stemmer* decision can be viewed as declaring the legality of New York's official wiretapping scheme, since the Court of Appeals relied upon *Harlem Check Cashing Corp.* v. *Bell* (296 N.Y. 15) which had expressly held the New York wiretap laws valid. *Stemmer* was not discussed in the later *Schwartz* and *Benanti* decisions. *Stemmer, Schwartz* and *Benanti* caused an understandable confusion in law enforcement circles.

The New York authorities also relied upon a pronouncement of the New York Court of Appeals, New York's highest court, in 1962 in *People* v. *Dinan* (11 N.Y. 2d 350), which sanctioned official wiretapping and the introduction of wiretap evidence in criminal trials in New York State.

They relied as well as on the public policy of the federal government. That policy was evidenced by the refusal of the Department of Justice and United States Attorneys to prosecute state officials under the Federal Communications Act for wiretapping and the use of wiretap evidence, and the refusal of a federal court in New York State to issue warrants for the arrest of State officials using wiretaps and wiretap evidence for violation of 605, upon application of a defendant in a State criminal trial. (See *Pugach* v. *Klein,* 193 F. Supp. 630, 630-41, S.D.-N.Y. 1961.)

They also relied upon the publicly expressed view of the Attorney General of the State of New York that it was his duty to defend the New York wiretapping legislation until a court of competent jurisdiction pronounced it unconstitutional.

In obtaining the wiretap order here in question, the New York authorities also relied on the permissive attitude of the Congress of the United States, which could have enacted legislation at any time prohibiting the use of wiretap evidence in State criminal trials. The fact that Congress saw fit to permit such use to continue tends to support the views of these distinguished commentators who have asserted that Section 605 was never intended by Congress to bar official wiretapping, however one may interpret its language (Hogan and Bradley, 46 Georgetown L.J., #3, pp. 421-2; Attorney General Herbert Brownell in 39 Cornell, L.Q., Winter, 1954, p. 197, n.10; 57 Colum. L. Rev. 1159, 1162; 6 Geo. Wash. L. Rec. 326, 329; 53 Harv. L. Rev. 863, 865; 26 Ill. B.J. 376, 377; 34 Ill. L. Rev. 758; 51 J. Crim. L.C. and P.S. 441, 442, n.14; 52 Mich. L. Rev. 430, 432; 15 N.Y.U.L. Rev. 279, 16 U.Fla. L. Rev. 120, 121, n.10; 24 Va. L. Rev. 451.)

Moreover, as one commentator has observed: "The Supreme Court has continually refused to reconsider" the *Schwartz* decision. "It is true that a crime has been committed, but for fifteen years the Supreme Court itself has authorized that crime. . . . It therefore seems reasonable that law enforcement officials acting pursuant to a statute . . . have the right to rely on it". (Robert M. Pitler, in Brooklyn Law Rev., Winter, 1968, p. 243.) Petitioner argues that state officials should not have relied upon *Schwartz* v. *Texas* after this Court promulgated the *Benanti* decision. In this connection, Mr. Robert Pitler has remarked: "Yet, in *Benanti* . . . the Supreme Court unequivocally stated: "Due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect" (Brooklyn Law Rev., Winter, 1968, p. 243).

It should also be pointed out that some officials followed the practice of using wiretaps merely to develop leads to other evidence and did not introduce the wiretaps in Court. It was not unreasonable for these officials, even after *Benanti*, to rely on the wording of 605 as exempting them from liability, since that wording, in its literal meaning, indicated that liability arose only where both a wiretap interception and divulgence had occurred. Section 605 reads in part: "No person . . . shall intercept any communication and divulge or publish the existence, contents . . ., of such intercepted communication to any person."

Some persons have argued that the second *Nardone* case (*Nardone* v. *United States*, 308 U.S. 338) and *Benanti* made it clear that either wiretapping *or* divulgence was a violation of 605. However, in *Benanti* (355 U.S., at p. 100, n5), this Court declared: "Because both an interception and a divulgence are present in this case we need not decide that both elements are necessary for a violation of Section 605." The *Benanti* case was a later decision than *Nardone II*.

Moreover, the United States Department of Justice and the Federal Bureau of Investigation in that department declared it to be their official position that 605 was not violated by wiretapping alone and that both tapping and divulgence were necessary to bring the statute into operation. They defined divulgence as publication outside of the governmental realm, thus viewing as exempt from the bar of the statute all divulgence among cooperating law enforcement officers. (See Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195, 197-199, 1954; Rogers, The Case for Wiretapping, 63 Yale L.J. 792-3, 1954; Katzenbach, 32 FRD 107; Hoover, 58 Yale L.J. 422-1949). It follows that reliance by law enforcement officers on the objective meaning of 605's phraseology may hardly be characterized as sufficiently unreasonable to render them ineligible for the benefits of the no-retroactivity approach.

Petitioner suffers from a signal handicap in his argument that law enforcement agencies cannot justify their reliance on *Schwartz* v. *Texas* in view of the clear indication in *Benanti* v. *United States* that the use of wiretaps by state officers was violative of 605. That heavy disadvantage is that this Court in *Linkletter* v. *Walker, supra,* adopted just the sort of approach of which petitioner disapproves. In *Linkletter,* the Court found that law enforcement had properly relied upon the Court's previous refusal in *Wolf* v. *Colorado* to mandate the exclusionary rule. This position was expounded in *Linkletter,* despite the fact that the *Wolf* case had also held that the illegal search there in question offended against the core of the Fourth Amendment which was binding on the states through the Fourteenth Amendment.

Thus even though the police officers were clearly advised in *Wolf* that they were required by the Fourteenth Amendment to conform their official conduct to Fourth Amendment standards, the Court sustained the propriety of their subsequent refusal to do so on the theory that they could properly rely on the Court's assurance in Wolf that the Fourteenth Amendment did not also provide the specific remedy of exclusion and that evidence illegally seized need not be excluded from State criminal trials.

This Court's refusal to grant an injunction prohibiting the introduction of wiretap evidence in a State criminal trial (*Pugach* v. *Dollinger,* 1961, 365 U.S. 458) tended to reassure state officials that this Court did not really disapprove of their use of wiretaps, especially since *Pugach* was rendered without an opinion and expressly relied on the *Schwartz* case.

Furthermore, it should also be pointed out that those officials using wiretapping evidence also relied on the generally permissive attitude of the American public, which is, after all, the repository of ultimate sovereignty and the final arbiter of the direction of legislative government.

The opinion of the New York Court of Appeals in this case states that ". . . thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan,* 11 N.Y. 2d 350, *cert. den.* 371 U.S. 877; *People* v. *Cohen,* 18 N.Y. 2d 650, *cert. den.* 385 U.S. 976, rehearing den. 385 U.S. 1032.)"

These "thousands" of orders referred to by the Court of Appeals were those issued in New York State alone. It is submitted that this Court should respect the Court of Appeals' findings in this regard. It should also be noted that the Court of Appeals held that 605 did not pre-empt the field so as to render invalid Section 1423, subdivision 6 of the Penal Law of New York, prohibiting wiretapping and the copying of taped messages (*People* v. *Broady,* 5 N.Y. 2d 500) and this Court denied certiorari (361 U.S. 8).

Petitioner argues that no issue of retroactivity is involved in this case and that petitioner's conviction may be reversed by prospective application of the *Mapp* decision.

Petitioner is clearly wrong in this contention, since *Mapp* did not bring wiretapping or, indeed, any form of eavesdropping within the control of the Fourth Amendment and did not impose the exclusionary rule with respect to wiretap evidence. To urge, as petitioner does, that this case may be determined in the manner petitioner suggests solely by prospective application of *Mapp* is to perpetrate a fiction and to make constitutional adjudication the servant of unrealism.

The approach which this Court has heretofore adopted in deciding the question of retroactivity has been the realistic one of determining whether, in fact, there was official reliance upon previously recognized legal principles. It is clear that the *Mapp* decision did not declare that wiretapping was a search and seizure or was regulated by the *Mapp* rule. In the years immediately following *Mapp,* it was universally assumed that wiretap evidence in State courts was not subject to its rule of exclusion. (See *Williams* v. *Ball,* 294 F. 2d 94, 2d Cir., 1961, *cert. den.* 368 U.S. 990, 1962.)

This view was supported by the persuasive factor that the *Pugach* decision, in 1961, relied in part upon the authority of *Schwartz* in the very same term of this Court in which *Mapp* overruled *Wolf.* Moreover, it can be argued that as recently as 1963, this Court, in *Lopez* v. *United States,* 373 U.S. 427, in effect, re-affirmed the *Olmstead-Goldman* rule, which confined the operation of the Fourth Amendment in eavesdropping cases to those in which a physical trespass had occurred. In addition, the Court seems to have given further recognition to the vitality of the physical penetration rule in 1964 in *Clinton* v. *Virginia* (377 U.S. 158) (see the concurring opinion of Mr. Justice Clark).

It was not until *Lee* that this Court held that 605 prohibited the use of wiretap evidence by State criminal juries, it was not until *Berger* that trespassory electronic eavesdropping was held subject to the warrant requirements of the Fourth Amendment, and it was not until *Katz* that this Court gave clear indication that non-trespassory electronic eavesdropping was governed by the Fourth Amendment. Since the wiretap evidence in question was obtained and introduced in evidence before *Lee* and *Katz* and, indeed, before *Berger*, these decisions should not be applied retroactively to this case so as to declare the wiretap evidence in question constitutionally infirm or objectionable under the provisions of 605.

Tested by the other two criteria mandated in this Court's retroactivity jurisprudence, it is clear that retroactive application should not be decreed in this case. Obviously, retroactivity would not remedy a deficiency in the fact-finding process because the wiretap evidence here in issue is probative evidence of the conversations to which it pertains. Furthermore, this Court has indicated that it may refuse retroactive enforcement, even in situations where the fact-finding process may have been somewhat compromised by the application of a prior rule of law (e.g. see *Tehan* v. *Shott*, *supra*; *Johnson* v. *New Jersey*, *supra*, and *Stovall* v. *Denno*, *supra*).

In its recent decision in *De Stefano* v. *Woods* (12 L.ed. 1308, decided June 17, 1968) this Court followed the *Stovall* rule in giving only prospective effect to its rule mandating jury trials in State criminal prosecutions.

There may have been some disadvantage to the fact-finding, truth-establishing process involved in the non-jury trial procedure at issue in this Court's *De Stefano* decision, but wiretapping improves the quality of the proof in criminal trials. (See Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice, pp. 95-96.)

With respect to the criterion of unfavorable impact on the administration of justice, it is plain that this standard alone precludes retroactivity in this case. In *Tehan* v.

Shott, this Court invoked that criteria in refusing retroactive implementation of the "no comment" rule, although only six States had procedures violating such rule.

Petitioner argues that if it should be decided that this case involves a retroactivity issue, the Court should apply the retroactivity rule of *Linkletter* v. *Walker* (381 U.S. 618), which provided for a limited retroactivity by indicating that the *Mapp* doctrine was applicable to cases on direct appeal at the time the *Mapp* decision was enunciated. In this connection, it may be pointed out that the holding in *Lee* is based upon 605 and not the Fourth Amendment, as petitioner concedes on page 58 of his brief. Therefore the *Linkletter* rule involving Fourth Amendment retroactivity does not perforce afford a pertinent standard for deciding the issue of retroactivity with respect to the *Lee* rule. Also, it does not necessarily follow that the *Linkletter* rule governs all types of Fourth Amendment issues. This Court declared in *Johnson* v. *New Jersey* (384 U.S. 719) in 1966, that

> ". . . we also stress that the retroactivity or nonretroactivity of a rule is not ordinarily determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly, as Linkletter and Tehan suggest, we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question'.

It is respectfully urged that the limited retroactivity principle of Linkletter is not appropriate in this case and that this Court in *Johnson* and *Stovall* has tended to reject the limited retroactivity approach selected in *Linkletter* in favor of rules oriented toward prospectivity. In *Johnson,* this Court held that the *Miranda* rule concerning confessions should only be applied to trials beginning after the date on which the *Miranda* decision was announced. Under this approach, the *Berger-Katz-Lee* decisions could not be applied to this case owing to the fact that the trial herein occurred before these decisions were announced.

In *Stovall*, this Court held that the *Wade* rule respecting police identification procedures should only apply to identification parades occurring after the date of the *Wade* decision. Under the *Stovall* rule, as well, the *Berger-Katz-Lee* doctrines could not be applied to this case, because the evidentiary procedure here in issue, the wiretap interception, occurred before those decisions were promulgated.

It is respectfully urged that the Court apply the *Stovall* rule in this case.

This Court's anti-retroactivity approach in the field of State criminal justice is in accord with its approach in the field of civil law, as may be gathered from the fact that *Linkletter* relied upon the Court's previous decision in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371. *Chicot* concerns the question of the effect of an earlier Federal District Court decree promulgated under a statute later pronounced unconstitutional. This Court refused to apply its declaration of unconstitutionality retroactively and held that the judgment based upon the invalid statute remained in effect.

Even a limited retroactive application of the *Berger-Katz-Lee* rules would have a deleterious impact upon law enforcement. Its consequence would be that all prosecutions throughout various sections of this country which depended upon wiretap evidence, or other evidence obtained as the result of leads procured from wiretap evidence, would be seriously embarrassed or defeated.

There is no good reason why retroactivity should be enforced in this case since Congress, in the Safe Streets Act, has recently enacted a law barring private wiretapping and strictly regulating official wiretapping by criteria incorporating the safeguards mandated in *Berger*. Also, New York State has enacted a new statute containing similar safeguards, and official wiretapping conducted in New York State between the time the *Berger* decision was announced and the new New York statute was enacted was required to comply with the *Berger* criteria by the holding of the New York Court of Appeals in this case rehabilitating the previous New York State wiretape statute. As the Court of Appeal's decision in Kaiser indicates, such rehabilitation is in accord with the precedent of this Court. Moreover, it would seem a matter of indifference to this Court whether Berger type standards were enforced by statute or by judicial decree, so long as those standards were in effect. One might as well argue that this Court's decision in *Miranda* was an exercise in rule-making.

In rehabilitating 813-a, the Court of Appeals assumed that this Court, in *Berger,* did not strike down Section 813-a in its entirety, but only invalidated it to the extent that it related to trespassory eavesdropping.

But, even assuming that this interpretation was incorrect and that 813-a was invalidated *in toto,* whether 813-a was rendered permanently disabled by such invalidation or could be revived by a decision of the Court of Appeals rehabilitating it is a matter of State law and does not engage the corrective attention of this Court. A federal question would be raised only if State authorities attempted to enforce 813-a in a manner violative of Fourth Amendment standards.

Moreover, it is interesting to note that there is authority in federal case law and the commentary of expert opinion for the proposition that a judicial declaration of statutory constitutionality does not annul the statute, but merely renders it unenforceable. From this perspective, it may be seen that the rehabilitation or judicial validation of a previously unconstitutional law would be congruent with accepted doctrines (See Nimmer, A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875, 65 Col. Law Rev. No. 8, Dec., 1965, pp. 1394, 1412, 14, 15, 17 and 18).

The Court of Appeals refused to decree retroactivity in this case, since it felt that the purpose of the exclusionary rule—deterrence of illegal police conduct—would not be served by a retrospective adjudication. It is respectfully urged that the Court of Appeals was right and that this Court should sustain the approach there taken.

POINT V

The introduction in evidence of the wiretaps here in issue was not violative of the Ninth Amendment and that Amendment does not establish a right of privacy enforceable in the circumstances of this case.

A. The Ninth Amendment does not protect telephonic privacy.

As an alternative to his Fourth Amendment approach, petitioner argues that the Ninth Amendment, enforceable through the due process clause of the Fourteenth Amendment, imposes a complete prohibition on all forms of official wiretapping and the use of wiretap evidence in State and federal criminal trials, and thus operates as a limitation on the scope of the warrant clause of the Fourth Amendment. Apparently petitioner's position is based upon the fact that the Ninth Amendment does not authorize the granting of a search warrant (as does the Fourth Amendment) and he therefore contends that rights under its protection are absolute and are not subject to invasion by authorization of a warrant upon a showing of necessity. A Ninth Amendment holding to that effect by this Court would not only imply the invalidity of the recently enacted "Safe Streets Act", but it would also clash with this Court's holding in *Katz* that official electronic eavesdropping is constitutionally permissible where it complies with Fourth Amendment criteria.

If petitioner's claim of an absolute right of telephonic privacy under the Ninth and Fourteenth Amendments should be accepted by this Court, the implication of such acceptance will be that all national legislation permitting court-authorized official wiretapping is unconstitutional. Such legislation is based upon the commerce power (see *Pugach* v. *Dollinger,* 277 F. 2d 739). Petitioner's absolute right thesis seems inconsistent with the doctrine, long settled in the jurisprudence of this Court, that the commerce power is plenary within its proper limits. This doctrine is indispensable to the maintenance of national union. If this Court curtails congressional power to provide for the methods of dealing with a mortal threat to national commerce—organized crime—by a decision declaring an absolute right of telephonic privacy founded upon the Ninth Amendment or upon the concept of due process (which presumably would be enforceable through the Fifth, as well as the Fourteenth Amendment), it will be accepting a view out of harmony with its well established position that the reserved power exercises no independent limitation on the commerce power of Congress. (See *United States* v. *Darby,* 312 U.S. 100.)

If this Ninth Amendment right is absolute, then presumably a state law enacted (pursuant to an enabling provision of the State Constitution founded upon the reserved power of the Tenth Amendment) to confirm this right (*i.e.* a state law prohibiting all wiretap interception of telephone conversations in which a person located in the enacting state is a party) would be an independent limitation on the exercise of the federal commerce power, as, for example, where a federal law enforcement officer wiretaps under the authority of a federal Eavesdropping Act enacted under the federal commerce power.

Such a result would not be consistent with the supremacy clause or the view of the commerce power as plenary, but would seem to follow from petitioner's absolutist theory of Ninth Amendment retained rights.

A holding by this Court that a general right of privacy is contained in the provisions of the Ninth Amendment would call into constitutional question all of the other privacy-invading investigative devices employed by law enforcement officers. The practical implications of such a situation are discussed in Section B of Point I of this Brief dealing with the Fourth Amendment question.

In this connection, it may be observed that the constitutional rights jurisprudence of this Court has tended to avoid such complete prohibitions (*e.g.*, the *Miranda* case where the Court refrained from prohibiting custodial interrogation and *Berger* and *Katz* where it stopped short of articulating a total ban on electronic surveillance). Moreover, this Court, in *Griswold* v. *Connecticut* (381 U.S. 479), indicated that the rights referred to in the Ninth Amendment are recognized in that Amendment but not created there and that such rights, being enforceable through the due process clause of the Fourteenth Amendment, are consequently subject to regulation like other Fourteenth Amendment due process rights. Justices Harlan and White, of course, did not feel it necessary to invoke the Ninth Amendment, finding the Fourteenth Amendment sufficient to support the decision. *Griswold* is discussed more fully later in this Brief.

Reliance upon the Ninth Amendment as a new instrument of constitutional adjudication will open the forum of this Court to every conceivable claim of privacy against local and federal government, and will unleash upon this Court unrelenting pressure to undertake a new career of extreme judicial activism in the service of a totally novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy. The Court will be called upon to vindicate endless claims of privacy and to invade a sphere of local life beyond the ambit of its historical concerns.

That such an enhanced role for the judiciary would incite a constitutional crisis as pervasive as that of the 1930's, is perhaps not an unreasonable expectation.

It would appear that there are certain conceptual difficulties involved in bending the Ninth Amendment to the service of telephonic privacy. The language of that Amendment, in speaking of rights which were not taken from the People by the Constitution, obviously refers only to rights then in existence.

The draftsman of the Ninth Amendment, James Madison, has expressed a similar understanding in the following words:

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights *which were not placed in that enumeration;* and it might follow by implication, that *those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.* . . . I conceive that it may be guarded against. I have attempted it . . . (in) the last clause of the fourth resolution (the ninth amendment). (Emphasis supplied.) (2 J. Story, Commentaries On the Constitution of the United States, 626-27, 651, 5th Ed. 1891).

Since the telephonic instrument was not yet invented when the Bill of Rights was adopted, it can hardly be claimed that the right to private use of this instrument was within the intention of the Ninth Amendment. Thus any technique of adjudication that seeks to protect privacy by enforcing alleged Ninth Amendment rights through the due process clause of the Fourteenth Amendment, as was done in *Griswold* v. *Connecticut* with respect to a long-established right, encounters formidable obstacles in constitutional theory in this case.

Petitioner's approach ~~is~~ deserving of rejection on this ground alone, because he clearly indicates that the Ninth

Amendment right of privacy he is seeking to assert did not exist when the Bill of Rights was adopted. (See pp. 40, 61, 62, Brief for petitioner.) Indeed, it is the thrust of petitioner's argument that since the telephone did not exist when the Fourth Amendment was adopted, the warrant clause of that Amendment can not be invoked as authorization for the issuance of wiretap orders. Although his statement of doctrine is fragmentary, his argument may be interpreted to suggest that once the telephonic conversation became an established method of communication, a right of telephonic privacy came into effect which was protected in the Ninth Amendment. Whether such right existed by virtue of its acceptance in the community or solely by operation of the Ninth Amendment is not stated.

Moreover, with all due respect to this Court's decision in *Griswold* v. *Connecticut* (381 U.S. 479), constitutional history indicates that the Ninth Amendment was designed to operate only with respect to the *federal* government. (See "Are there 'certain rights . . . retained by the People'?" Norman Redlich, New York University Law Review, Volume 37, Number 5, November 5, 1962, pp. 805-806.) It was not intended to limit the ways in which the citizens of the several states organized the governmental power of their state governments. That this is so gains confirmation from the fact that where the Framers elected to provide for intervention by the federal government in the affairs of state government, as they did in Article IV, Section 4 in commanding the United States to insure that the forms of state government should be republican, they were quite capable of making specific provision to that effect.

The Ninth Amendment appears to conceive of rights possessed by the states and the people thereof, and it follows that if the so-called Ninth Amendment rights be viewed as including patterns of rights other than those existing when the Ninth Amendment was adopted, the states can regulate these rights in the public interest. This Court cannot be viewed as holding to the contrary in *Griswold* since *Griswold,* unlike this case, did not involve a situation where the people, by state constitutional provision, had approved the statute under review. Indeed, the Court indicated that such regulation was constitutionally acceptable where it was not too sweeping in character. This Court has recognized the legitimacy of regulation in its jurisprudence of the Bill of Rights and the Fourteenth Amendment and there would appear even less reason to doubt it in a Ninth Amendment context seeking to enforce a right not protected in any specific guarantee of the Constitution.

In any case, if the pattern of Ninth Amendment rights be viewed as evolving rather than static, then on any reasonable theoretical analysis, it must be conceded that the sovereign People, in contriving the structure of state government, and constituting it the repository of their sovereignty, have delegated to it the authority to regulate those rights which are recognized in the Ninth Amendment. With respect to the State of New York, the process of delegation is specific and visible. In Article I, Section 12 of the New York Constitution of 1938, and in succeeding revisions thereof, the People have extended to law enforcement officials the power to obtain and use wiretap evidence.

Certainly the Framers of the Ninth Amendment and of the original Constitution (the two separate pronouncements of fundamental law being substantially contemporaneous in time), did not conceive that the Constitution should be invoked by a national judicial organ to supervise the relationships between the states and their citizens and to forbid the states from exercising such powers of local government as the People saw fit to grant them in state constitutional convention.

The theory of the Ninth Amendment urged by the petitioner is radical. If accepted, it will be the means of working a fundamental change in the federalist structure of authority ordained by the Framers. It would, in effect, change our form of government from a federalist to a quasi-unitary type in which national authority (and not even national legislative authority at that, but national judicial authority) has the discretion to determine the forms and methods of local government and its law enforcement agencies.

Such a dramatic shift in the locus of governmental power would limit local individual rights as well as local governmental power. This is so for the reason that added rights to the accused granted under the aegis of the Ninth Amendment would consist of rights granted not only against state government, but also against the community of citizens that relinquished such rights (if, indeed, telephonic privacy was ever such a right) to the control of local government in order that other individual rights (e.g., freedom from criminal injury and criminal invasion of privacy) might be secured.

Thus this Court would be drawing to itself the authority to nullify the power and right of the people to choose the pattern of rights and duties which it felt would best secure that general welfare which is declared to be a ruling purpose of the Constitution in the Preamble to that instrument. Thus the local populace would be deprived of the power of democratic control over the conditions of local life in clear violation of the Tenth Amendment, the basic principles of divided sovereignty on which the Constitution is founded, and the doctrines, established in the Preamble that our form of government derives its legitimacy from the consent of the governed, and that the ultimate source of all governmental power is the sovereign people.

Since it is the people who are victimized by crime, it is they who should decide when the incidence of criminal injury has reached the point where further expansion in the rights of the accused reducing the operational effectiveness of law enforcement is unacceptable.

In arguing for an absolute right of telephonic privacy, petitioner goes Justice Brandeis one better, for even that supreme proponent of privacy doctrine conceded that there was no absolute and unqualified right to privacy in the telephonic context. (The individual should be protected against "every *unjustifiable* intrusion;" Brandeis *J*, dissenting in *Olmstead* v. *US*, 277 US 438 at 478-479) (emphasis supplied).

Since, as we have seen, the right of telephonic privacy could not have been one of those contemplated by the Framers as recognized in the Ninth Amendment, it follows that petitioner, in relying upon the Ninth Amendment, is asking this Court to create a new right by judicial fiat. This case is different from *Griswold* v. *Connecticut* where the marital right recognized by the Court was one of ancient origin and unquestioned acceptance (381 U.S. 486, 496). Petitioner's claim raises a serious question as to the authority of this Court, under the limited grant of jurisdiction set forth in the judicial article of the Constitution, to undertake this ambitious task which is urged upon it. The Constitution has merely empowered the federal judiciary to decide cases in accordance with law and to prefer federal law over local law in situations where they conflict. This judicial power and obligation to decide in accordance with law necessarily implies the auxiliary function of interpreting the law. But it carries with it no implication that the judicial functionary shall expand and amend the law so as to establish rights not recognized by constitutional language or by the People, the Framers, or the States when Ninth Amendment was adopted.

Where rights are defined in the Constitution, it can be argued with some plausibility that, in confronting constitutional phraseology which is, to some extent, vague, as is the due process clause, an adjudicating tribunal should sketch in the boundaries and frame the limits of constitutional rights by acts of interpretation, with the help of such recognized aids to interpretation as will assist the exegetic process. But the judicial function regarding rights, as it is projected in the Constitution, is interpretive and not creative. A federal court should not, by judicial fiat, impose upon the states, contrary to local custom and preference, the Court's own conception of a vague grant, where, as in the case of the Ninth Amendment, they are not sketching in boundaries of rights defined in the Constitution but, instead, are dealing with a reference to rights already established by extra-constitutional processes.

Rights, whether they be considered as grounded in custom or in natural law, are not established by the Ninth Amendment. The best scholarship on the subject concedes that the Ninth Amendment merely recognized rights which existed prior to the adoption of the Constitution (See Patterson, "The Forgotten Ninth Amendment," page 20). The opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut* also recognizes that the Ninth Amendment is not an independent source of rights (381 US at 492).

In this connection, perhaps the most distinguished student of our public law, Dean Roscoe Pound, has observed:

> ". . . where rights not declared in terms are 'reserved' there is a question as to where is the power of defining them, and where is the power of securing them when defined. The Tenth Amendment seems to preclude definition and enforcement by the federal government except as committed to that government by the Constitution. It would seem, therefore, that these reserved rights may be defined and enforcement of them may be provided by the states, except as may be precluded by the Fourteenth Amendment, or may be defined and acquire secured enforcement by the people of the United States by constitutional amendment.

Assuming that the Ninth Amendment is a general recognition of inherent or natural rights, it does

> not purport to secure them. It lays down no rules such as are provided in articles I to VIII inclusive. It declares that there are natural rights but makes no attempt to define those not expressly provided for in the Bill of Rights nor to provide for securing them. But the states have the attributes and powers of sovereignty so far as they have not been committed to the federal government by the Constitution. So far as inherent rights are not committed to the federal government, defining and securing them is left to the states or to be taken over by the people of the United States by constitutional amendment. Are not the Ninth and Tenth Amendments authority for state legislation to define and secure inherent reasonable expectations in life in civilized society as it is today."

("The Forgotten Ninth Amendment," *supra,* page VI.)

If Petitioner's Ninth Amendment approach be accepted to the extent of conceding, *arguendo,* that Ninth Amendment rights are evolving rather than fixed and immutable, then it is pertinent to inquire as to the source of the rights within the scope of the Ninth Amendment if the source is not, as we have seen, the Amendment itself. One possible source is local custom. Some might argue that rights so elaborated are subject to change at the pleasure of the populace whose customs are invoked although not, by definition, at the Court's instance.

If it be argued that the local rights of a particular time were federalized by the Ninth Amendment and, through constitutionalization, rendered immune from change by the community in which they arose, then it follows that the Court certainly can not alter or add to them. Some observers would contend that such a limit on local sovereignty is inconsistent with the provisions of the Tenth Amendment. From this perspective, it would seem that since the Constitution did not define or enumerate the preexisting rights which it referred to in the Ninth Amendment, it can scarcely be said that such rights were "established" or federalized by the Constitution, beyond the power of evolving local custom or policy to change.

Even if this view be accepted, it would not necessarily follow that the Court has the power to enforce these rights, as may be gathered from Dean Pound's statement (*supra*). If *Griswold* be viewed as assigning this role to the Court (and *Griswold* is not authority for the proposition that Ninth Amendment rights are evolving) that would still not relieve the Court of the obligation of accurately discerning community standards. It is clear that "the traditions and (collective) conscience of our people" envisaged in *Griswold* as the source of rights, do not indicate general and uniform acceptance of an absolute right of telephonic privacy as against official interception in the State of New York. That this is so is evidenced by the permissive constitutional and statutory provisions which were in effect in New York at the time of the wiretapping herein and in existence now. Nor can the *Berger* type safeguards in the present New York law be considered part of New York's local tradition, because these standards were enacted to satisfy this Court's *Berger* rules. And the common law of New York has rejected the general right of privacy doctrine (see *Roberson* v. *Rochester Folding Box Co.,* 171 N.Y. 583).

While the custom in other states is not relevant, it is interesting to note that they have not uniformly accepted prohibitions on official wiretapping. (Standards Relating to Electronic Surveillance, American Bar Association, Project on Minimum Standards for Criminal Justice, pages 19-20.) The truth is that public opinion does not support prohibitions on official electronic surveillance. (A. Westin, Privacy and Freedom, p. 207.)

Another possible source of the rights referred to in the Ninth Amendment is the body of "natural rights" theory. Modern proponents of this theory might seek a new role for this immemorial tradition by offering it as the content of a new and more influential Ninth Amendment. But, that special variant of the doctrine of natural rights employed to justify restrictions on the vital regulatory activities of the State, has been rejected by this Court. (Corwin, The Constitution and What It Means Today, 12th rev. ed., pp. 234-5.) If its career were revived, it might be seized upon as the legitimizing ethos for reactionary interests, as it was in the past.

Also, if one accepts the concept of natural rights in its historical dimensions rather than in its restricted aspect as the vindicator of narrow ideologies, it must be conceded that such a right as freedom from official telephonic eavesdropping is nowhere recognized in the social life of this Nation. If there be such natural right, it must be confirmed by historic growth and not judicial imagination. Its recognition in positive law must emerge by autochthonous development from the creative impulses of society.

Furthermore, the natural rights philosophy affirms that such rights are only those which are universal in character, and it follows from this that they must have wide recognition throughout the Nation or, by definition, they are not universal natural rights. Since the limited public sentiment against official wiretapping in this country has never attained the status of a generally accepted value, it can hardly qualify as evidence that a universal natural right to telephonic privacy is a part of our national tradition. Certainly no such right is recognized in New York, as we have seen.

It is respectfully prayed that this Court consider the dangers of invoking the Ninth Amendment in this case. If it declares that a right of telephonic privacy is recognized in the Ninth Amendment, its decision might be interpreted as saying that all evidence obtained by non-physical invasion of a situation of privacy must be excluded from evidence in State criminal trials. Indeed, this result was anticipated by one commentator before *Berger* and *Katz* were pronounced. (See, Luis Kutner, 51 Marquette, L. Rev., No. 2, pp. 121, 136-7.) This same commentator sets forth an awesome list of interests which might be brought within the protection of the Ninth Amendment. If these suggested items, and others certain to be urged upon the Court, were accepted as an agenda for judicial action, the resulting imbalance in the traditional federalist patterns of sovereignty could justly be described as the most far reaching innovation in governmental structure since the establishment of the principle of judicial review.

POINT VI

The Due Process Clause of the Fourteenth Amendment affords no basis for reversal of the judgment of conviction.

A. The Due Process Clause of the Fourteenth Amendment does not protect a pure due process right of privacy independent of the specific guarantees of the Bill of Rights.

Let us assume that this Court should hold that wiretapping is not governed by Fourth Amendment standards. Does petitioner still present a claim cognizable under the due process clause, i.e., does he have a pure due process right of telephonic privacy and has it been invaded? If so, must the Court reverse? Respondent submits that the Court should not disturb the judgment in this case. Official wiretapping is a policy matter. It is not of such a nature as to require that the Court carefully supervise local police eavesdrop activity. In any event, Congress has provided for national legislative control in the Safe Streets Act.

It may be argued that this Court's supervision is required, e.g., in enforcing the Commerce Clause of the Constitution in order to prevent the states from burdening, by regulation or excessive taxation, that process of interstate commerce which is the life's blood, of a national society. This judicial approach is simply not necessary in the context of law enforcement, since it is a matter of indifference to the objective of national union and stability whether localities permit official eavesdrops in support of their crime control activities and what procedures they sanction in connection with the pursuit of these activities. To the extent that our people wish to deal with this problem in a national frame of reference, they may employ the machinery of the national legislative establishment.

This Court has not yet taken the momentous step of finding a general right of privacy in the Fourteenth Amendment. While various commentators have urged that the due process clause be employed to vindicate a constitutional principle of privacy independent of the provisions of the specific guarantees in the Bill of Rights, the Court has not seen fit to cut itself adrift from the stable referents of the first eight Amendments and to enter a vague and formless domain of policy without the guidance of specific standards. It is respectfully submitted that the Court should re-affirm its adherence to that approach in this case.

An examination of the decisions of this Court which are sometimes referred to by commentators as its privacy jurisprudence, reveals that the Court has protected interests conceptually different from that of telephonic privacy. In its decisions approving local action protecting civic repose against the blaring of a sound truck (*Kovacs* v. *Cooper,* 336 U.S. 77) and protecting domiciliary repose against the vexatious annoyance of door to door solicitors (*Breard* v. *Alexandria,* 341 U.S. 622) the Court was simply pronouncing the right of local government to regulate in the general welfare. Moreover, the interests involved in these cases, i.e., the interests in repose and freedom from annoyance, are fundamentally different in character from the interest in telephonic secrecy. The claimant of the right of telephonic privacy does not assert a right to be free of vexatious irritations. On the contrary, it is the essence of the telephonic interception that is performed in silence and without the knowledge of the conversant.

In *Meyers* v. *Nebraska* (262 U.S. 398), the Court was affirming the positive rights to engage in foreign language study and to indulge in a lawful vocation, that of teaching, and in *Pierce* v. *Society of Sisters* (268 U.S. 310) it was declaring the parent's traditional freedom of decision and action in the upbringing of his children. Neither of these decisions vindicates a privacy interest. Both pronounce a "freedom to" rather than a "freedom from." And in *Pub. Utilities Comm.* v. *Pollak* (343 U.S. 451) this Court held that the due process clause of the Fifth Amendment did not protect a right to be let alone.

Even the common law of torts has been slow to recognize, under the right of privacy concept, the special sort of interest for which petitioner here seeks constitutional protection. Dean Prosser, analyzing the many tort decisions founded upon the right of privacy concept, concludes that they may be classified under four categories having no common conceptual core: (1) intrusion upon solitude or seclusion jeopardizing mental tranquility; (2) public disclosure of embarrassing facts harming reputation; (3) placing the victim in a false light by publicizing false information damaging reputation; and (4) appropriating another's name or image or artistic or intellectual creations for economic benefit so as to invade his proprietary interest in his own personality. (Prosser, Privacy, 48 Calif. Law Rev. 383, 389, 402). At other times, Dean Prosser has reduced the number of categories to three, but, in any event, has concluded that the right of privacy is not a separate and distinct tort with its own special conceptual essence.

It is obvious that none of these interests are asserted or assertable here (even if the Constitution's Fourteenth Amendment could be said to enact a partially later developed tort law). The interest in tranquility is not involved, since petitioner, while speaking over the telephone, was not aware that an interception was occurring. The public disclosure category is not involved because both that form of action and the action for disturbance of tranquility have been applied only to the actions of private persons, and not to officials enforcing the criminal law. If these categories of tort law were extended to public officials, it would be impossible to operate a system of justice, since it involves, at virtually every stage, the sort of consequences envisaged in these tort categories. These same observations pertain with respect to Dean Prosser's third category, placing in a false light before the public, and his fourth category, appropriation of a proprietary interest in personality for the economic benefit of the appropriator. These categories are simply irrelevant to the law enforcement context.

Professor Bloustein, another leading authority on the right of privacy, attempts to extract a conceptual nucleus from all of the special interests which have been classified under the privacy concept, but the organizing principle he finally arrives at as the essential interest in privacy is so vague, i.e., human dignity, that, if accepted in constitutional adjudication, it would authorize the protection of an endless range of interests as varied as those multitudinous occasions of dignity-infringement which are the everyday result of government's operation. (See Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 971, 973, 981, 989, 993.

Nor does this Court's decision in *Griswold* v. *Connecticut* pronounce a due process right of privacy. Some commentators have read *Griswold* v. *Connecticut* as standing for the proposition that the due process clause of the Fourteenth Amendment enforces a right of privacy against the states. They have viewed the decision as prohibiting the intrusion of official power into the privacy of the marital relationship. It is submitted that the view of *Griswold* which conceives of it in terms of privacy analysis is missing the doctrinal essence of that decision.

In addition to relying on the "too drastic means" test (which this Court has heretofore applied in First Amendment contexts rather than in due process cases—see *Ratner*, 116 U. of. Pa. L.R., #6, April, 1968, pp. 1082, 84, 86), *Griswold* merely re-affirms that well established tenet of due process jurisprudence that the police power may not express itself in the regulation of social situations beyond the ambit of its authority or by a regulatory means ill-adapted to its objective. It does no more than restate the traditional conception that the regulatory initiative of the State must confine itself to those activities of social life which are within the power of government to treat.

This Court in *Griswold,* if I do not mistake its meaning, simply said that it would not permit the limitation of the *freedom of* marital *decision* in the circumstances presented in *Griswold,* since the alleged legislative purpose—the prevention of marital infidelity—though a valid purpose of governmental regulation, was sought to be achieved by regulatory means which were too sweeping in their reach and which invaded an area of personal autonomy beyond the claims of sovereignty thus suggesting an unacceptable implicit purpose. In the *Kaiser* case, the situation presented is fundamentally different in its legal nature. In *Kaiser,* the machinery of criminal investigation validly may be employed, since its animating purpose—the enforcement of the criminal law—is constitutionally acceptable and since the machinery invoked is discriminately adapted to that purpose.

While the Ninth Amendment was cited in *Griswold* to show that married persons had an enforceable marital right, at least as against a statute that sweeps too broadly, that right was not a right of marital privacy, but a right of marital freedom of action, i.e., the right of married persons to indulge in marital sexual relations in the manner they choose and to use contraceptives in the conduct of those relations. It was a "freedom to" do something, not a "freedom from" something. (For another application of this dichotomy, see Beaney, The Constitutional Right of Privacy, 1962 Supreme Court Review, p. 249.) This no more involves a right of privacy than the right of married people to determine how they will talk to each other in private or in public. Obviously, such rights are not absolute. Where a husband, for example, imposed upon his wife against her will a method of sexual intercourse that resulted in serious bodily harm or death, he could be held legally accountable. On the same principle, a private conversation between a husband and wife consisting of a conspiracy to murder could also be the subject of criminal punishment.

There is no difference in principle between the *Griswold* holding and a decision which, for example, declares that the organized state may not dictate the color of the clothing worn by its citizens. The intervention of state power into this domain of personal decision would be objectionable because it would be an attempt to bring within the cognizance of official power matters which, under our theory of government, are beyond the control of the state.

In the example just given, it would make little difference whether the regulatory measure in question sought to preempt the power of personal decision with regard to clothing worn in public or in private. In either case, the State has bent its sovereignty to a use foreign to its nature and it matters not whether the regulatory means chosen to enforce the assertion of sovereignty are privacy-invading or not.

It is true that the Court in *Griswold*, in Justice Douglas' opinion, in which Justice Clark joined, also mentioned with distaste the possibility that the privacy of the marital domicile might be invaded by the investigative machinery of the criminal law but the consideration which made this prospect distasteful was the implied premise that such invasion would be in the service of an objective beyond the power of the State to achieve. Certainly this Court would not have viewed as objectionable an investigative invasion prompted by the State's enforcement of the normal substantive provisions of its criminal law.

There is nothing in the *Griswold* decision which would bar the search of the marital bedroom, provided that such a search was authorized by a warrant obtained through a showing that there was probable cause to believe that such a search would yield evidence of a crime within the legislative power of the State to punish. *Griswold* does not hold that marital privacy or any other kind of privacy cannot be invaded by the devices of official investigation; it simply declares in its dictum that the investigative power of the State can not be unleashed to assist the discharge of a governmental regulation beyond the ambit of the police power. It is specifically declared in *Griswold* that adultery, fornication and sexual misconduct may be dealt with by the criminal law (381 U.S. at 498, 9).

Griswold may be viewed either as a re-affirmation of the well established "too drastic means" rule or the "improper legislative purpose" principle. Presumably, the Court concluded that the legislative purpose suggested by the sweeping regulatory means differed from that which the statute purported to serve. The opinions of Mr. Justice Douglas and Mr. Justice Goldberg are based on the theory that penumbras of the First, Third, Fourth, Fifth and Ninth Amendments grant a fundamental marital right enforceable through the Fourteenth Amendment, which guarantees to married couples the right to decide for themselves whether or not to use contraceptives.

It is, therefore, fair to say that the deeper thrust of *Griswold* is not understandable in terms of privacy analysis and that the case, in its ultimate significance, represents an affirmation of classic principles. Indeed, it has been suggested that even the penumbra technique whereby the Court arrived at the interest to be protected was not an exercise in legalistic innovation (See Lewis, the High Court: Final . . . But Fallible, 19 Case Western Reserve Law Review, #3, April, 1968, page 530).

In the light of the foregoing considerations, it is of significance to observe that the government in *Kaiser* did not seek or attempt to *regulate* telephonic privacy; it only attempted to enforce the criminal law. The criminal laws enforced in this case have long been accepted in our constitutional tradition and can hardly be regarded as too sweeping or drastic. Since such enforcement is a valid, indeed fundamental, objective of the politically organized society, the invocation of the investigative device of wiretapping to assist that enforcement was constitutionally unexceptionable. This follows from the well established principle that government may use any technique of execution reasonably related to a valid governmental objective, provided that technique is not so heinous in its nature as to offend the conscience of mankind (*Rochin* v. *California,* 342 U.S. 165; *Irvine* v. *California,* 347 U.S. 128; *Schmerber* v. *California,* 384 U.S. 757; *Breithaupt* v. *Abram,* 352 U.S. 432), because the state's residual power of government gives it discretion to determine its own criminal procedure (*Cole* v. *Arkansas,* 338 U.S. 476; *Lanzetta* v. *New Jersey,* 306 U.S. 451; *Whitney* v. *California,* 274 U.S. 357; *Kay* v. *U.S.,* 303 U.S. 1; *Hoag* v. *New Jersey,* 356 U.S. 464; *Hurtado* v. *California,* 110 U.S. 516). Since the New York wiretap law here involved was not a regulatory Act, it can not be said to "deprive" of "liberty" within the meaning of the due process clause.

A regime of wiretapping under an official wiretap statute like 813-a and the individual instance of tapping here involved are "in the interest of the community" (as will be shown presently) and so, under the established due process jurisprudence, would be justifiable invasions of telephonic privacy even if that privacy were an ingredient of the concept of liberty recognized in the due process clause. But it is suggested that it is not. Liberty implies freedom of action, freedom to do something; it implies that government cannot limit freedom of action, except in a good social cause; it does not suggest that subtle intrusions on privacy which do not limit individual freedom of action are within the control of that clause. It is true that, under reigning doctrine, the Fourth Amendment is held to be incorporated in the due process clause of the Fourteenth Amendment but the Fourth Amendment is not a privacy law, as is shown in Section C of Point I in this Brief. It forbids seizure of person or property without compliance with the standards it mandates just as the due process clause forbids deprivation of a person's freedom or property without compliance with due process standards.

The *Griswold* penumbra approach is inappropriate here. The Third Amendment does not protect the same sort of interest as is asserted by those demanding telephonic secrecy. Like the Fourth Amendment, it seeks to prevent disruption of domiciliary repose and seizure of property. That the First, Fourth, Fifth and Ninth Amendments do not protect such a secrecy interest, is shown elsewhere in this Brief.

In *Irvine* v. *California* (342 U.S. 165), state officers had committed a trespass in order to plant a microphone in the bedroom of defendant's residence and had used the eavesdrop evidence so obtained as the basis for a conviction for bookmaking. This Court declared that the eavesdrop there in question was outrageous and violated the core of the Fourth Amendment, which had previously been held in *Wolf* v. *Colorado* to be enforceable through the Fourteenth Amendment's due process clause. However, the Court felt constrained by the *Wolf* Court's rejection of the exclusionary remedy to decide that due process did not require *exclusion* at the *trial* of this illegally obtained evidence. The Court said that the so-called "shocking" to "the sense of justice" exception to the *Wolf* rule of non-exclusion in Fourth Amendment cases which was articulated in *Rochin* v. *California* (342 U.S. 165) applied only to situations where the evidence was obtained by the commission of physical brutality on the person of the accused. In view of this holding in *Irvine,* it would appear that there is no pure due process right to freedom from official eavesdropping. That this is so may be inferred from the fact that the eavesdropping involved in *Irvine* could not have been justified as a proper exercise of the police power in view of the Court's unfavorable characterization of the trespass by which it was effected. (It is, of course, possible to view the case as standing for the proposition that even where official eavesdropping is violative of a due process right, that principle does not require that evidence so obtained shall be barred from use at the trial. This point will be discussed presently.)

Thus in view of *Irvine,* there is no reason to suppose that the interest in privacy as against official eavesdropping is cognizable under the due process clause. It is true that the doctrinal framework of *Irvine* is not elaborated in terms of a privacy analysis. However, the holding in *Irvine* would appear to be totally inconsistent with the view that such a right of privacy is within the protection of the pure due process standards of the Fourteenth Amendment and exists independent of any alleged Fourth Amendment basis for such a claimed right of privacy.

The language of the majority opinion in *Rochin* would seem to confirm this analysis. In, *Rochin,* the Court reversed a conviction founded upon evidence obtained by a forcible pumping of the defendant's stomach. There Mr. Justice Frankfurter said:

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. *We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers* and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record" (emphasis supplied).

The Founding Fathers never conceived of a generalized right of privacy as against law enforcement investigative activities and certainly the Fourteenth Amendment was not proposed or adopted for this purpose. Even if it be conceded, *arguendo,* that that Amendment was enacted to incorporate the Bill of Rights, that intention, at most, could only have contemplated those rights in the form in which they then existed, with the breadth of guarantees then recognized. None of the specific guarantees provided for, nor were viewed as providing for, the right of telephonic privacy. If we accept the novel theory that the Constitution conferred a broad right of privacy, then it is difficult to explain why the adopters of the Bill of Rights framed specific guarantees granting specific rights without mentioning the right of privacy and why the draftsmen of the Fourteenth Amendment did not give it explicit recognition so as to remedy this deficiency in the Bill of Rights.

If this radical doctrine of privacy be accepted, then it follows that every type of privacy—invading activity indulged in by the police is violative of a right of privacy embodied in the due process clause of the Fourteenth Amendment.

In applying First Amendment guarantees through the Fourteenth Amendment, this Court was at least applying rights which had received explicit Constitutional recognition. To read the right of privacy into the Fourteenth Amendment is to create a right out of whole cloth without the assistance of any standards to guide adjudication in its determination as to which of the innumerable types of interests classified under the concept of privacy are within the Fourteenth Amendment and under what circumstances.

This is the formula for constant conflict between the Court and the agents of local sovereignty. In view of the pervasive character of necessary governmental regulation in the modern world and the investigative activities auxiliary to the exercise of the regulatory power, it may confidently be expected that a judicial recognition of the Fourteenth Amendment as the source of a right of privacy would inaugurate an unlimited flow of claims against local and national government. If the Court acted boldly in redress of those claims it might well effect a fundamental change in the structure of governmental power and in the relation of government to the people.

In such a situation there is always the danger that, unobtrusively and by a slow process of attrition, the adjudication of claims of privacy having significance far beyond the limited context of the special controversy, may undermine the regulatory process by which the disorder and complexity of a highly interdependent society is brought within the conscious and coordinated control of society's chosen agencies of adaptation. And once such a regime of adjudication is inaugurated, it may be difficult to avoid such a result.

It may also be observed that even if it be assumed, *arguendo,* that the private right of telephonic privacy is recognized in the common law and in popular custom, that does not mean that such a right is protected by the Fourteenth Amendment. The due process clause of that Amendment does not protect every conceivable variety of interest, but only those that may be said to have attained the status of fundamental rights.

In *Griswold* v. *Connecticut,* Justice Goldberg conceived of rights enforceable through the Fourteenth Amendment as being comparable in ranks to rights, enumerated in the Bill of Rights. This Court, in *Griswold,* seemed to accept the premise that such rights must be "so rooted in the traditions and conscience of our people" as to be truly fundamental and this approach is certainly in accord with the position that the Court has consistently maintained. It can hardly be said that the interest in being free of court-ordered official wiretapping, if recognized as a right, would be a right as fundamental as those in the Bill of Rights. It is surely reasonable to insist that a judicial tribunal may not recognize such a right where it does not really exist in the community conscience and then exalt it to the level of an organic imperative by constitutionalizing it.

There is authority to the effect that the due process clause of the Fourteenth Amendment does not secure a right of privacy (*United States* v. *Goldman*, 118 F. 2d 310; *Travers* v. *Paton*, 261 Fed. Supp. 110).

Petitioner asks this Court to violate its most hallowed theoretical precepts and to propound the revolutionary thesis that the Constitution ordains an absolute right of privacy which will not yield to transcendent considerations of public welfare. The police power principle of necessity, sometimes referred to as the emergency power, would seem to pose a formidable doctrinal impediment to the acceptance of petitioner's standpoint. This doctrine would justify official wiretapping where necessary in the public interest just as it would authorize a municipal fireman to destroy a house in the path of a fire. If an owner's property can be invaded and even destroyed for a public purpose under the sanction of necessity, it seems frivolous to argue that a telephone wire could not be invaded under similar circumstances. It is respectfully submitted that the facts of this case, and particularly the threat of physical danger to the victim of the extortion plot and his daughter, clearly amount to a situation of necessity.

The claim of privacy here urged upon this Court is new in conception. It was unknown in earlier times and traces its genesis to the increasing complexity of a mass society. It was not a notion within the contemplation of the Framers of our Constitution and, even now, it has yet to win its way to general social or legal acceptance. In these circumstances, it is respectfully urged that the interest in telephonic privacy, like other newly emergent interests, should seek its recognition in the domains of legislation and public opinion. Its claim of right has not

B. This Court should refuse to find an absolute right of privacy as against law enforcement in the Due Process Clause of the Fourteenth Amendment because such a right is indefensible on either philosophical or practical grounds.

The absolute privacy thesis urged by petitioner suffers from the deficiency of the partial view. It insists upon the privacy of that limited class of persons who would be subject to telephonic interceptions under the safeguards of new laws, while ignoring the privacy of those victims of crime which can only be protected by official wiretapping.

To view the problem of constitutional decision in narrowly individualistic terms is to commit that sin of political empiricism against which Professor Hans Morgenthau has so eloquently inveighed. It is to ignore the wider bearings of the problem under consideration. It is to see the claims of freedom in an excessively restricted frame of reference and to ignore the profound lesson of modern history: that social freedom is maximized only by that strategy of judgment which inquires as to the factual results of alternative forms of decision and the impacts these will have on all of the interests whose freedoms are at stake in the act of decision. To see the judicial task as solely one of enhancing the freedom of the individual suitor or the interest he represents, regardless of the overall effect on social freedom and well-being, is to accept the rationale of a more primitive stage of legal development.

As one scholar has recently observed in commenting upon the concept of natural law: "Its remnants are yet to be seen as we proceed with a new stage of legal growth and development, sometimes described as the stage of socialization of the law—as we pass from a society characterized by contractual relations, with free individual self-assertion as the end of law, to a new relational society conceived in terms of new rights and duties, or, to reverse the famous phrase of Sir Henry Maine, "from contract to status" (James A. Gardner, Legal Idealism and Constitutional Law, Villanova Law Review, Fall, 1964, Vol. 10, #1, page 38).

Viewed in this perspective, it may be seen that the school of legal thought which insists upon expanding the freedom or privacy of one class (e.g., the criminal accused) at the expense of society as a whole or without regard to the freedom or privacy of other classes in the community is really reactionary, rather than progressive, and seeks to revive an ideology which was decisively rejected by this Court in the realm of economic policy in the constitutional revolution of the 1930's.

The political theory upon which the Constitution was founded was the social compact—natural rights doctrine, which viewed political society as that consciously created agency of the community to which were entrusted by its members only so much of their natural rights as was necessary to enable that agency to protect the remainder. Individual rights were viewed as logically and naturally prior to society and superior to all those claims of government which did not arise from the performance of these minimum functions for which government was constituted. This peculiar adaption of natural law theory was suited to an age of unbridled individualism but, as society advanced to a higher plane of interdependence, the attempt by forces of special privilege to invoke its justification was rejected by this Court as the instrument of a retrograde jurisprudence. This obsolete system should not now be revived by inadvertence. This is not to suggest that there is no theoretical or practical merit in the natural law standpoint as it has developed outside of the field of constitutional law. It is only to argue that society is not well served by a variant of that school of thought which, violating the intention of the seminal thinkers who were its intellectual fathers, sterilized that viewpoint of its recognition of the organic nature of society and restated the theory in the context of a naively individualistic political philosophy which viewed society in atomistic terms.

It is one thing to champion an absolute individualism where one is merely asserting those traditional categories of rights which were clearly ordained by constitutional language and accepted from the very beginnings of the Republic. It is another to insist upon this approach when favoring an expansion in the rights of the accused or some other class which is unrecognized by constitutional language and unknown to constitutional tradition. Where a constitutional court pursues its role as innovator, it ought to accept the guidance of a more enlarged conception and the assistance of a more careful methodology. It should fashion for itself a tactic of decision which takes due account of the ethos of a relational society so that the judicial function may constitute itself the servant of a wider freedom rather than the agent of a rote and inflexible parochialism.

As it comes to its task, it should be ever mindful of T. H. Green's sovereign insight that rights are the product of organized society and thus subject to those adjustments in their content and extent necessary to the health and well-being of that society.

This Court has held that where First Amendment values conflict with the values of privacy, the latter must give way up to the point where freedom of expression is abused. (*Time, Inc.* v. *Hill,* 87 Sup. Ct. 534). The constitutionally preferred position of First Amendment rights has been pronounced even in cases where the material sought to be published did not involve the reporting of news or the expression of political or social opinion, but rather was designed simply to provide amusement (*e.g., Time, Inc.* v. *Hill, supra; Jenkins* v. *Dell Publishing Co.,* 143 Fed. Sup. 952, aff'd 251, Fed. 2d 447, 3rd Circuit, cert. den. 357 U.S. 921). Indeed, one commentator has declared that this Court has shown greater deference to speech and press in right of privacy suits than in tort suits (Privacy, Defamation and the First Amendment: The Implications of *Time, Inc.* v. *Hill*, 67, Colum. L.R. #5, May, 1967, p. 939).

The rationale of preferential treatment for free expression is its indispensability to the progress and stability of the free society. A similar mode of analysis confirms the centrality of the law enforcement process. It is the obvious function of law enforcement to protect private life against the disruptive effects of criminal invasion. Only as it does its work effectively can the individual mark off for himself that domain of privacy within which his creativity may be nurtured. It is the paradox of democratic theory that selective invasion of this domain of privacy by government for good cause shown is a necessary condition of the general and continuous maintenance of those circumstances of external public order through which the structure of privacy is sustained.

But the significance of law enforcement in the contemporary age transcends the narrow conception which sees it as the mere engine of social tranquility. It has other crucial functions to perform in the service of democratic institutions and, to the extent that this mission is discharged effectively, it may justly be deemed one of the great democratic corrective forces of the free society.

In a society organized to permit the untramelled advocacy of political doctrine by the tactics of violence and disorder, each ideology would press its claims to the limit, disdainful of the progressive values, partial truths and limited advances in social outlook embodied in competing political schools of thought. Political life would become a continuous exercise in intimidating vocal combat and clamorous special pleading. Such a regime stifles free trade in ideas. It is hardly conducive to that balanced and tentative discourse in which the subtle contours of truth are progressively disclosed through orderly, and cooperative public inquiry and disciplined judgment.

Through the enforcement of a democratic scheme of authority, each shade of opinion is permitted to contribute to public discussion that peculiar dimension of truth which its special standpoint has discovered, and the process of free politics becomes a vehicle for coalescing the limited truths of sectarian outlooks into a broader and expanding body of knowledge and principle. Only in the society in which law enforcement does its work effectively, can the characteristic process by which progress emerges receive the fullest tolerance of its operation.

Those who, in the name of some narrow and temporary view of progress, would stand insurgent against the forces of law which are the guarantors of a broad and orderly realization of progress, are really the enemies of the democratic society rather than its friends.

Law enforcement has still another vital function to perform as a democratic corrective force.

In the contemporary age, as never before, crime is one of the great social problems of American society, not only because it menaces the physical safety of our people but, more, because organized crime threatens to pervert our economic and political institutions and put them under the control of elements who would use the power so derived to exploit the citizenry rather than to seek its benefit.

When such elements achieve social power, they use private and public institutions to fasten upon society a regime of exploitation rather than to serve society as agencies subject to its control.

Crime constitutes not only a direct infringement on physical and economic well-being; it may also provide the devices by which social power is removed from the possession of the people, thus denying them the means of organizing society's processes in accordance with their own ideals and of exercising a meaningful control over their own destiny.

In this sense, organized crime is deeply anti-democratic. As crime becomes progressively more organized and extended in the scope of its influence, it takes on the aspect of a second government, weakening the vitality of legal government and exerting a form of social control in some areas of activity approximating that of a formal dictatorship—only without the high degree of visibility which subjects even dictatorships to some degree of popular control through its tendency to galvanize and focus public attention and sentiment.

A democratic society whose central processes are susceptible to perversion and capture by venal forces of self-interest is a democracy in name only since, in fact, the goals and values which shape the direction and form of communal life are, to a great extent, no longer subject to the consent of the governed.

Those familiar with the activities of organized crime in the fields of banking, securities and other types of legitimate business and in using such devices as usurious loans and control of stategic labor unions and agencies of local government to ruin or enslave legitimate businessmen, are aware of the increasing effectiveness with which organized crime has imposed its will on various sectors of our society. (See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, pp. 187-190; Standards Relating to Eelectronic Surveillance; American Bar Association Project on Minimum Standards for Criminal Justice, General Commentary by Prof. G. Robert Blakey, pp. 31, 37, 38, 40, 41).

Law enforcement in present-day America is not merely the neutral function of preserving the external conditions of public order. On the contrary, it should be one of the most significant means of insuring that the freedom that the open society confers shall not be used to distort its essential nature or to subject it to that morbid derangement of function which violates the ultimate ideas and assumptions on which it is founded.

The same rationale which justifies preferred status for freedom of expression corroborates the primacy of that mechanism of enforcement which insures the conditions in which free expression and the democratic process do their work most effectively.

It follows that penal law enforcement deserves a status of pre-eminence in the pantheon of constitutional values, and, in its confrontation with the claims of privacy, is entitled to an indulgence which can not reasonably be extended to other types of official activity and unofficial activity invading the sector of privacy. Therefore the balances of interests reflected in other phases of public law and the privacy case law of torts are not appropriate standards by which to test the constitutional propriety of those investigative devices which are the indispensable instruments of crime control.

The State has the power to subpoena witnesses in criminal trials, although this infringes on their right of privacy. Nor is it necessary for the State to give proof amounting to probable cause that evidence of crime will be obtained from such witnesses and to obtain a court order approving the issuance of the subpoenas. This is not required because the balance of social interests long recognized in our constitutional tradition affirms the overriding importance of the enforcement of the criminal law, and no good reason appears why the species of privacy known as telephonic privacy should be accorded a constitutional rank superior to other forms of privacy.

The argument in support of a preferred status for law enforcement does not proceed in a vacuum. The march of events has enhanced its force and the deepening insights of a more sophisticated age reveal that law enforcement, as regulator of the discordant energies of a mass society, is the vindicator of privacy rather than its enemy.

In a simpler epoch, the crucial importance of law enforcement as a democratic corrective force was unforeseen. In a complex, interdependent, large-scale society where dislocations of the orderly patterns of private life have scintillating social effects and where the power of predatory forces to infiltrate the centers of social and political power and to corrupt the agencies of private endeavor is increasing with every passing day, the enforcement of the conditions of public order and social health becomes a preeminent enterprise of civilization. In such circumstances, the counsels of wisdom suggest a wider range of prerogatives for the minions of criminal justice. In such a time, the unlimited privacy of the frontier is not the appropriate model for a rational social philosophy. The imperatives of an advancing complexity demand that strategic privacies give way to the claims of the regulatory and investigatory state as a condition of the maintenance of that general equilibrium without which all rights of privacy are placed in deadly peril.

C. Even if it be conceded, *arguendo*, that the Due Process Clause of the Fourteenth Amendment protects a right of telephonic privacy, that right is subject to regulation under the police power of the State.

Even if telephone privacy is viewed as "liberty" protected under the Fourteenth Amendment's due process clause, that liberty, as we have seen, is subject to regulation under the police power where such regulation confers benefit on society.

In *West Coast Hotel* v. *Parrish* (300 U.S. 379), Chief Justice Hughes articulated the principle by which may be tested the constitutional propriety of regulation under the police power.

> "The Constitution does not speak of freedom of contract. It speaks of liberty . . . (T)he liberty safeguarded is liberty in a social organization which requires the protection of law in a social organiza-

> tion against the evils which menace the . . . welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process.''

The language in *Parrish* discloses that the ''reasonable regulation'' rule it recognizes is the standard of legitimacy with respect to governmental invasion of the substantive rights protected in the due process clause. Thus it is applicable to claims of privacy as well as other substantive due process claims.

It might be argued that the *Parrish* rationality test has been superseded, at least where personal rights are at stake, by the compelling subordinating interest[1] test approved in the Opinions of Justice Goldberg and Justice White in *Griswold* v. *Connecticut* (381 U.S. at 497, 504), and in *McLaughlin* v. *Florida* (379 U.S. 184, 196), and *Bates* v. *Little Rock* (361 U.S. 516, 524).

However, these cases involved rights clearly fundamental in nature. The interest in telephone privacy is not of that exalted order. Moreover, this test is really but a restatement of the traditional ''too drastic means'' principle. It rejects an exercise of the police power which, under the guise of reasonable classification or rational regulation seeks to justify an encroachment on fundamental rights which could have been avoided without disservice to the governmental objective in question by a less discriminatory classification, or less sweeping application of sovereign power. Clearly, this doctrine, first, propounded in the context of racial discrimination cases, and reaffirmed by only four justices in a case in which there was in issue the most sacred right known to man—marital freedom, was not meant to test the constitutional propriety of ordinary acts of law enforcement having no racial connotations. At most, it would apply only to a regulatory act rather than the means of its enforcement. It can hardly be invoked to invalidate the traditional forms of penal prohibition.

In any case, it is clear that under this test the wiretapping here in issue and official wiretapping in general are constitutionally unimpeachable, as may be gathered from the ensuing discussion in this brief demonstrating the necessity of both. From this discussion it may indeed be concluded that both are justified by that same doctrine of necessity which permits the invocation of the police power to destroy or seize private property in times of emergency.

That the particular wiretapping here involved was in the interest of the community is obvious. The victim of an extortion plot had been threatened, his daughter had been threatened and his wife had been beaten. It was vitally necessary to learn who had committed the assault on the wife, who had threatened the daughter and whether and when an attempt would be made to inflict physical punishment on the object of the extortion scheme. It was necessary to obtain this information not only to forestall further assaults, but also to bring the perpetrators to justice and to defeat the scheme of extortion. As is shown elsewhere in this brief, there was good reason to believe that such information might be obtained from the wiretaps in question and, indeed, it was so obtained. As a result of the wiretap evidence so procured, the conspirators in this scheme of wrongdoing were brought to justice. In the light of these facts, it is hardly extravagant to conclude that the wiretapping in question was the source of public benefit.

As to the benefits of wiretapping in general, there is impressive scholarly opinion to the effect that wiretapping is an indispensable investigative device. The President's Commission on Law Enforcement and Administration of Justice, at page 7 in its report entitled The Challenge of Crime in a Free Society, declared:

> "... the American system was not designed with Cosa Nostra-type criminal organizations in mind,

> and it has been notably unsuccessful to date in preventing such organizations from preying on society . . ."

On page 201 of its report, the Commission stated that solely "in New York have law enforcement officers achieved some level of continuous success in bringing prosecutions against organized crime." The Commission felt that this success was due "primarily to a combination of dedicated and competent personnel and adequate legal tools". At page 95 of its report, the Commission declared that these adequate legal tools consisted of electronic surveillance. At page 203 the Commission recommended the enactment of legislation permitting court-approved official wiretapping.

The law enforcement practice of electronic surveillance under Court authorization has also been approved as necessary and desirable by the Judicial Conference of the United States, House Document No. 194, 90th Cong. 1st Sess. 80 (1967), The National Association of Attorneys General, S. Rep. No. 1097, 90th Cong., 2d Sess. 75 (1968), The National District Attorneys Association, Id. at 76, The National Council on Crime and Delinquency, Ibid., The Association of the Bar of the City of New York, Committees on Federal Legislation and Civil Rights, Report of April 24, 1968.

In its recently released tentative draft entitled "Standards Relating to Electronic Surveillance", the American Bar Association Project on Minimum Standards for Criminal Justice has also taken a position in support of court-authorized wiretapping and electronic surveillance. In the General Commentary appended to the standards, Professor G. Robert Blakey clearly demonstrates that official wiretapping is an indispensable instrument in the war on organized crime, declaring that "the alternative to electronic surveillance has, in short been tried and found wanting . . ." (p. 77).

D. Even assuming, *arguendo*, that the Due Process Clause of the Fourteenth Amendment secured to petitioner a substantive right of telephone privacy and further assuming that the wiretapping in question violated that right, petitioner still can not obtain reversal of the judgment of conviction because the Due Process jurisprudence of this Court does not require exclusion of the wiretap evidence in circumstances such as these.

From the foregoing discussion, it may be seen that petitioner presents no valid due process claim to this Court. But, even if it could be said that petitioner was favored with a "pure" due process right as against official eavesdropping (i.e., a due process right independent of the provisions of the Fourth Amendment), and that it had been violated in this case, that would not justify his prayer for reversal of the judgment herein. The combined legalistic effect of *Wolf, Rochin* and *Irvine* was to establish the proposition (never held applicable in this Court's confession jurisprudence, however), that the exclusionary rule in due process cases is not available as the remedy against pre-trial evidence-gathering offensive to due process unless it involves physical brutality to the body of the accused within the contemplation of the *Rochin* rule. In both *Wolf* and *Irvine,* it had been held that the seizure in issue violated the core of the Fourth Amendment inherent in the due process clause of the Fourteenth Amendment, but that due process did not require that the evidence so obtained be barred from use at the trial. In *Irvine,* this Court refused to sanction the request that it deal with the trial stage in such a way as to control pre-trial violations of due process where there was no deficiency in the truth finding process at the trial. In *Rochin* and *Irvine,* the Court made it clear that this approach would only be discarded in favor of exclusion if the due process violation involved physical brutality to the person such that the sense of justice would be shocked by the use of evidence obtained by such heinous means. *Irvine* declared that an invasion of privacy by eavesdrop did not constitute an additional category of exception to the general non-exclusionary approach. That approach seems consistent with the Court's "fair trial" jurisprudence in which it refused to set aside State criminal convictions, save in those situations where official wrongdoing had clearly affected the integrity of the trial fact-finding process to the extent of violating minimum standards of justice (e.g., cases involving intentional use of perjured evidence by the prosecutor, such as *Miller* v. *Pate,* 360 U.S. 264 and *Mooney* v. *Hollahan,* 295 U.S. 103).

Mapp v. *Ohio* (367 U.S. 43), overruled *Wolf* and *Irvine* to the extent of holding that evidence obtained by State officers in violation of Fourth Amendment standards must be excluded from a state criminal trial or the state judgment of conviction must be reversed. However, the theoretical basis of Mr. Justice Clark's opinion for the Court was not that the introduction of the illegally seized evidence at the trial was violative of pure due process standards, but rather that the exclusionary rule was an ingredient of the Fourth Amendment. Thus it may be said that there is nothing in the due process clause itself, apart from its Fourth Amendment element, mandating the exclusion at the trial of evidence obtained in the pre-trial stage by methods violative of the due process clause. It is true that a contrary rule was followed by this Court in its State confession cases even before *Miranda* and that, since *Mapp,* the contrary rule has been followed in search and seizure cases. However, the *Rochin* rule was rather recently approved in *Schmerber* v. *California* (384 U.S. 757). It is true that Schmerber, not involving unconstitutional police action, does not expressly articulate the proposition that unconstitutional pre-trial evidence-gathering will not require exclusion at the trial stage on pain of reversal.

But *Schmerber* indicates that the *Rochin-Irvine* rule still provides the standard of exclusion in pure due process cases, i.e., cases involving due process claims not based on a specific guarantee of the Bill of Rights. The *Rochin* rule, in requiring that evidence be excluded where obtained by physical brutality offensive to the sense of justice, implies that, in the absence of heinous conduct of the type there involved, exclusion shall not be decreed. *Irvine* affirms this implication in explicit terms.

Schmerber also indicates that the wiretapping here involved is not unconstitutional. If the compulsory drawing of blood involved in *Schmerber* is acceptable in the interest of law enforcement, certainly the less drastic practice of silent wiretapping could not be held to exceed the bounds of propriety.

There is nothing shocking to the civilized conscience in court-authorized official wiretapping, as may be gathered from the fact that 27 states permit authorized interception. (See 68 Colum. Law Rev., #2, p. 207.) Certainly the President's Commission on Law Enforcement and Administration of Justice would not have recommended judicially-approved official wiretapping if it offended basic principles of justice.

Indeed, the public interest weighed more strongly in this case, since the crimes here involved are more serious than the drunken driving charge at issue in *Schmerber*. And since this case, unlike *Schmerber,* involves the operations of organized crime, the public interest in law enforcement should be viewed as weightier still. (See G. Robert Blakey, 112 Pa. L. Rev., #4, p. 556.)

Therefore *Schmerber,* by affirming the continued vitality of *Rochin,* seems to reinforce the clear directive of *Irvine* that evidence obtained by pre-trial official eavesdropping will be controlled by the Court's non-exclusionary rule and will not fall within the *Rochin* exception to that rule.

Wolf v. *California* found the core of the Fourth Amendment included in the Fourteenth Amendment's due process clause, but held, in effect, that the exclusionary rule was a mere remedy and not an ingredient of the Fourth Amendment. The exclusionary rule was enforceable in those circumstances, if at all, as a "pure due process" requirement, that is, a requirement of fundamental fairness. But *Wolf* said that exclusion was not required by the fairness rule since that rule ordained only fundamental principles of justice. In the Court's view, the fact that so many states had refused to adopt the exclusionary rule indicated that it was not of fundamental character. The fundamental fairness rule is not applicable to the pre-trial stage of evidence-gathering as such because the Fourth Amendment is a substantive rights provision and the "fairness" concept is a procedural rule which applies to the trial stage. Thus the question in *Wolf* really was whether the introduction of evidence at the criminal trial obtained during the pre-trial stage in violation of the substantive rights enacted in the Fourth Amendment amounted to an infringement of the fundamental fairness concept. *Wolf* said "no", as did *Irvine* v. *California.* *Mapp* did not really give a different answer. *Mapp* simply said that the exclusionary rule *was* an ingredient of the Fourth Amendment, *i.e.,* it was a part of the Fourth Amendment package. *Mapp* did not reject the standpoint inferrable from the *Wolf-Rochin-Irvine* decisional axis that the pure due process fairness rule did not require exclusion at the trial of evidence obtained by pre-trial methods violating substantive rights of due process but not involving physical brutality.

With respect to confessions and cases involving the physical extraction of evidence, a different intellectual technique is implied in the Court's decisions. In the confession cases, and in *Rochin,* where physical evidence was obtained by brutal physical compulsion, the Court did not consider or impliedly recognize the question of whether a substantive right was involved. It simply decided that it would be shocking to the sense of justice to permit evidence obtained by coercion or brutality to form the basis of conviction.

However, where *testimonial* compulsion was not involved, as in *Breithaupt* v. *Abrams* (352 U.S. 432) and *Schmerber* v. *California,* the extraction of evidence by physical compulsion was not regarded as requiring exclusion at the trial under the fairness rule where the extraction was not accomplished by heinous or brutal official conduct. The confession and physical extraction cases are purely procedural due process cases. The Court's framework of analysis in such cases does not reflect a conception of the problem in dichotomous terms as consisting of a pre-trial stage involving an identifiable substantive right and a trial stage involving a procedural due process claim. The reason this mode of analysis has not gained currency, it is suggested, is because there is no established constitutional right of privacy from which could be deducible a special and narrow variety of privacy with respect to the human body. Thus, the Court's general approach in the pure due process cases relating to criminal procedure would seem to confirm Respondent's argument that the due process clause of the Fourteenth Amendment does not contain a right of telephonic privacy.

Nor is petitioner entitled to invoke this Court's "fair trial" jurisprudence in the circumstances here present. The fair trial principle has been employed to deal with defects in trial procedure rather than illegalities of evidence gathering in the pre-trial stage.

In its elaboration of the "fair trial" standard, this Court has reversed criminal convictions in cases involving intentional use of perjured evidence by the prosecutor (*Miller* v. *Pate,* 360 U.S. 264; *Napue* v. *Illinois,* 360 U.S. 264; *Pyle* v. *Kansas,* 318 U.S. 213; *Mooney* v. *Hollahan,* 294 U.S. 103); failure of the prosecutor to disclose exculpatory evidence (*Giles* v. *Md.*, 386 U.S. 66); presumptions without rational basis which impose a burden of proof upon the accused (*U.S.* v. *Romano*, 383 U.S. 136; *Tot* v. *U.S.*, 319 U.S. 463; *Morrison* v. *Cal.*, 291 U.S. 82); trial before a Judge with an emotional or financial interest in the result of the trial (In re *Murchison*, 349 U.S. 133; *Tumey* v. *Ohio*, 273 U.S. 510). All of these cases involve fundamental defects in the truth-finding process.

Even if petitioner's brief be interpreted as asserting such a due process claim, it is clear that he is not entitled to succeed on this ground, for the evidence contained in the recordings of the wiretaps herein is probative and petitioner has not claimed otherwise. Indeed, a noted authority has declared that wiretapping raises the evidentiary quality of the proof and insures fairer criminal trials (G. Robert Blakey in General Commentary to Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice, pp. 95, 96).

POINT VII

Petitioner may not invoke the Fifth Amendment as the source of a right of telephonic privacy.

Petitioner appears to rely upon the self-incrimination provision of the Fifth Amendment, enforceable through the due process clause of the Fourteenth Amendment, as the source of a right of privacy protective of the interest which he advances before this Court.

The privilege against self-incrimination of the Fifth Amendment is not really a privacy doctrine. The privilege was founded upon the ethic that government should not be permitted to compel the accused to convict himself out of his own mouth under threat of punishment for failure to answer. In its genesis and historic development, it had nothing to do with privacy, although dialectical ingenuity may succeed in finding a privacy value in it by a conceptual analysis which ignores its historic purpose.

Moreover, it is plain that the mere secret interception of petitioner's telephone conversations did not involve testimonial compulsion and thus would not give rise to a right of redress under the privilege against self-incrimination. It is difficult to conceive how the mere interception of petitioner's conversations can be said to have compelled those conversations since petitioner did not even know at the time that they were being intercepted.

This Court would seem to have adopted a similar line of analysis. It held in *Olmstead* v. *United States,* 277 U.S. 438, that wiretapping was not violative of the privilege against self-incrimination because it did not involve testimonial compulsion. This part of the *Olmstead* decision has not been overruled. This Court reaffirmed that standpoint in a context involving secret participant monitoring of a face to face conversation (See *Hoffa* v. *U.S.,* 385 U.S. 293).

Nor can petitioner seek a vindication of his claim by a resort to the underlying values of the Fifth Amendment. This Court has held that the scope of the privilege against self-incrimination does not coincide with the complex of values it helps to protect, and that the privilege has never been given the full scope suggested by such underlying values (*Schmerber* v. *Calif.,* 384 U.S. 757).

If the Fifth Amendment is seen as fully coinciding with its underlying values, then it would follow that an accused may not be compelled to do anything that would assist the development of a criminal case against him such as submitting to a blood test, to fingerprinting, to an identification parade, etc. However, all of these compulsions were viewed by this Court in *Schmerber* as raising no Fifth Amendment question.

If the privilege's animating purpose is seen as the prohibition of all reliance on the accused himself as an evidentiary source regardless of whether compulsion be involved or not (as petitioner's claim implies), then, on that same principle, courts would be required to rule out, as constitutionally illegitimate, on-the-scene identification of criminal perpetrators, shadowing of suspects, and all other investigative techniques whereby something was learned by watching or listening to the defendant or observing something he wrote or produced.

It follows from the foregoing discussion, that petitioner has not sustained his claim that the wiretap interception in question violated his privilege against self-incrimination.

POINT VIII

The wiretapping here in question was not violative of petitioner's First Amendment rights nor does a statute permitting court-authorized official wiretapping offend against the First Amendment.

Petitioner argues that official wiretapping constitutes a restraint on free expression and is thus violative of the First Amendment. However, he does not allege or demonstrate that it operated as such a restraint in this case, so it can hardly be claimed that petitioner's rights were infringed. (Indeed, that petitioner spoke so freely in the conversations here in question, despite the fact that the practice of official wiretapping had been established in New York State since 1938, is a complete refutation of his fanciful theory.) Petitioner's First Amendment argument becomes irrelevant if the Court accepts respondent's contention (in section B of Point II) that its adjudication in this case should not be directed to the validity of the now repealed New York statute under which the wiretap order in this case was obtained, since petitioner's argument in this regard seems to contemplate that freedom of expression would be curtailed by an established course of official eavesdropping, not a single instance.

Petitioner has made undocumented, speculative assertions concerning the effect of official wiretapping on freedom of expression, but he has not provided the Court with any data to support those assertions. Although wiretapping practices have been employed by public officials and private persons all over this country for many years, there is no indication that free trade in ideas has been restricted by them. Only criminals involved in continuing conspiracies are likely to be apprehensive about wiretapping. Other persons are not likely to suspect that they may be subjected to it and thus their telephonic speech would not be inhibited.

As will be shown presently, official wiretapping does not restrain the free exchange of ideas, and even if it did, it would only have that effect with respect to the conversations of criminals since, under the statute here in question, and under the new federal and New York State statutes, official wiretapping is confined to instances where it can be shown that an interception on the telephone line in question would yield evidence of crime. Criminal conversations may be, and universally are, prohibited by the criminal law and thus there would seem to be no constitutional bar to suppressing them indirectly by threat of eavesdropping.

Moreover, if wiretapping is considered objectionable on First Amendment grounds, then it follows that every other type of police surveillance technique must be also constitutionally suspect. Official acceptance of such an analysis would constitute an insuperable obstacle to the enforcement of our laws concerning national security and labor union corruption and would seriously impede the control of criminal conspiracies. Such programs of enforcement are based upon the work of undercover agents, many of whom must attend meetings and public and private convocations at which views are expressed. The principle for which petitioner contends, if carried to the limits of its logic, would seem to forbid all such investigatory activities.

Even if official wiretapping did exercise a restraining effect on the telephonic communications of persons communicating criminal intelligence, that would not disqualify it from constitutional acceptance since it is well established that speech which is brigaded with action, or which contains a dimension other than mere expression (See *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284), or which plans or counsels criminal enterprises may be regulated or suppressed.

Even if official wiretapping constituted a restraint on First Amendment freedoms, it would only be an indirect restraint and this Court and others have frequently rejected First Amendment claims in such situations where the claimant sought to frustrate the execution of some valid governmental purpose. (*United States* v. *Rumley*, 345 U.S. 41; *Watkins* v. *United States*, 354 U.S. 178; *Barenblatt* v. *United States*, 360 U.S. 109; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Uphaus* v. *Wyman*, 360 U.S. 72; *Adler* v. *Board of Education*, 342 U.S. 485).

In these indirect restraint situations the Court has dispensed with the clear and present danger test and has employed the *ad hoc* balancing test to sanction governmental action. Indeed, this Court has usually not seen fit to vindicate claims based upon indirect restraint, save in the situation where such restraint operated upon a book seller or a distributor of literature under such circumstances as to pose a serious danger that freedom of the Press would be restricted (e.g., *Smith* v. *California*, 361 U.S. 147). It may be noted in passing that even with respect to direct restraints on First Amendment freedoms, it is well established that the First Amendment does not ordain absolute principles and that the adjudication of a challenge to a regulatory act on First Amendment grounds requires a judicial balancing of interests. (*Breard* v. *Alexandria*, 341 U.S. 622; *Roth* v. *United States*, 354 U.S. 476, 483-485). Much of the commentary on this subject takes the view that the clear and present danger rule, as it has evolved since *Dennis* v. *United States* (341 U.S. 494, 517), is nothing more than an *ad hoc* balancing test (e.g., see Emerson, 72 Yale L.J. #5, P. 911).

This Court has more than once decreed that First Amendment interests must give way to an overriding public interest. Among the public interests given precedence over free expression by this Court are: the effectiveness of the military recruiting system (*Gilbert* v. *Minnesota,* 254 U.S. 325); the efficiency of war production (*Schaefer* v. *United States,* 251 U.S. 466; *Debs* v. *United States,* 249 U.S. 211; *Abrams* v. *United States,* 250 U.S. 616; *Frohwerk* v. *United States,* 249 U.S. 204); domestic order and tranquillity (*Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Cox* v. *New Hampshire,* 312 U.S. 569; *Whitney* v. *California,* 274 U.S. 357; *Gitlow* v. *New York,* 268 U.S. 652); national security (*Dennis* v. *United States,* 341 U.S. 494); public protection against the threat of violence between religious or political groups (*Beauharnais* v. *Illinois,* 343 U.S. 250; *Feiner* v. *New York,* 340 U.S. 315).

Since the enforcement of the criminal law is the paramount function of local government, it follows that official wiretapping would be constitutionally acceptable under the First Amendment jurisprudence of this Court, even if it did involve an indirect restraint on free expression, which it does not. Nor can petitioner validly claim a right of privacy founded upon the First Amendment. While this Court has pronounced a limited right of First Amendment privacy, that right has been confined to situations involving freedom of association. This Court disclosed the restricted rationale of First Amendment privacy in its decision in *Gibson* v. *Florida Legislative Comm.* (372 U.S. 539), where it quoted from *N.A.A.C.P.* v. *Alabama* (357 U.S. 449, 462) in the following words:

> "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . inviolability of privacy in club association may in many circumstances be in-

> dispensable to preservation of freedom of association, particularly where a club espouses dissident beliefs."

Since this case does not involve such a lawful associative context, there is no ground for invoking the Court's freedom of association doctrine and the narrow rule of privacy which is its derivative. Thus it is clear that petitioner can not rely upon a First Amendment right of privacy. Moreover, this type of interest is not the same as that sought to be invoked by petitioner herein.

Respondent contends that the pertinence of First Amendment theory in the realm of telephonic communications is far from self-evident. The telephone is not the natural setting for the exercise of First Amendment freedoms. Since this instrument did not exist when the First and the Fourteenth Amendments were adopted, it can hardly be said that the Framers intended that First Amendment principles should prohibit governmental action tending to exercise a restraining effect on telephonic expression.

The Framers envisioned the mails, the printing press and the face-to-face discussion as the agencies of expressionary freedom and there would seem no good reason to insist that telephonic communications be favored with the same indulgence in view of the fact that these other avenues of expression are still available. There seems little which cannot be said concerning political, intellectual and sexual subjects in public discourse and the possibility of electronic eavesdropping would hardly be likely to induce a reticence concerning such matters in the present permissive climate of opinion. And even if a regime of wiretapping exercised some restraint on the discussion of intimate, personal matters, such expression is not the type necessary to political and intellectual creativity.

In many telephone conversations, one or the other of the parties, and often both, is in an office or a public place or at least in a situation in which other persons are present. Therefore a wiretap ban would only mean that there would be a few less witnesses—not no witnesses. The official witness conducting the wiretap interception under a statutory regime could not reveal the substance of the conversation unless testimony regarding it should be introduced in Court, whereas the private persons hearing it through physical proximity would hardly be so constrained.

Even assuming that a permisive wiretap program of tapping and public divulgence in legal forums might induce caution and a withholding of the fullest conversational exchanges in telephone talks, it is patent that such caution would only operate to inhibit discussion of illegal acts or embarrassing subjects, e.g., sexual talk. It would not inspire timidity as to legitimate business matters (at least where all but official wiretapping was banned), so economic life would not be restrained.

Can it justly be said that there is really any great need to preserve the fullest freedom of communication with regard to embarrassing subjects? Such matters, too, may be dealt with in personal conference or written missives. There is really no pressing public need to rely on the telephonic medium for such purposes, and what limited advantage in increased communication is conferred by the telephone in this regard seems hardly so weighty a social benefit as would justify significant restrictions on the effectiveness of law enforcement.

On any reasonable application of the *ad hoc* balancing test, this interest in idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement.

That such small talk should not be given the status of protected speech is suggested by this Court's refusal to extend the protection of the First Amendment to advertising and commercial speech. At the very least it may be said to rank low on the scale of constitutional values.

It is not vital to the well being of the republic that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution.

The impressive technology of telephone communication, which was developed at enormous cost and effort, was not conceived for the purpose of serving as a vehicle for such conversations. The interception of them does not interfere with any activities protected by the justifying rationale of telephonic technology or by basic social values. Most Americans, if questioned on the subject, would surely say that such conversations should be limited to personal confrontations and should not be conducted over the telephone. In any event, interception of such conversations would not embarrass the participants under a court controlled wiretap regime, since they would not be revealed in Court except in those rare instances in which they were enmeshed inextricably with criminal communications.

It is perhaps for this reason that few citizens in New York, if any, have any sensation in their daily lives that their privacy is being invaded, and this is true despite the fact that New York's permissive scheme for wiretapping has long been in effect. Even criminals continue to discuss their illegal enterprises over the phone, as they did in this case. The fact is that the overwhelming majority of telephone conversations are so pedestrian and lacking in interest or color, that the participants would hardly be constrained by fear of eavesdropping.

Not every interpersonal setting qualifies for the full protection of the First Amendment. There are a wide variety of social contexts in which the guarantees of free expression are regarded by the law as inappropriate or applicable only to a limited category of actors in such contexts, (e.g., parent-child, student-teacher, lecturer-audience, policeman-arrestee, panic-stricken mob in crowded theatre, etc.). In these situations, practical considerations and historical traditions have mitigated against the mechanical application of inapt principles. Consequently there is justification in precedent for the contention that official wiretapping should not be automatically subjected to the full apparatus of First Amendment limitations.

Petitioner's First Amendment objections to wiretapping are based upon fancy, rather than fact. In an exhaustive study on official wiretapping in the American Bar Association's recent tentative draft on Standards Relating to Electronic Surveillance, Professor G. Robert Blakey completely discredits claims such as that advanced by petitioner. In the General Commentary to the American Bar Association draft, Professor Blakey declares:

At page 47—

> "For example, between 1950 and 1959, the Office of the District Attorney of New York County, where electronic surveillance techniques have been vigorously employed, handled 343,745 criminal matters, yet wiretaps were installed in only 219 investigations and only 727 wiretap orders, including renewals, were obtained.[127] This pattern of limited, but vigorous, use has been the same in recent years. After 1958, when court order bugging became possible, the Office "averaged only about seventy-five wiretap orders per year—used only for leads and not court disclosure—and about nineteen bug orders per year."[128] What has been true of the Office of the District Attorney of New York County has also been largely true of the other agencies serving the cities. This data thus must be placed in another context. New York City has about five million phones in a population of eight million people contained in approximately two million households.[129] Court order wiretapping and bugging, it must be concluded, has thus had virtually no impact on the vast majority of citizens."

and at page 88—

> "The statistics noted above on law enforcement use in New York City should lessen the fear that lawful law enforcement surveillance would unduly curtail free speech."
>
> "* * * Finally, there is no substantial evidence today that the personal, intellectual, political, religious, or commercial life of the New York community has measurably suffered because of law enforcement use of these techniques. The fear that authorized electronic surveillance techniques might seriously impair free communication thus appears unfounded. Indeed, members "of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephone tapped, have continued to meet and to make relatively free use of the telephone."

It is, therefore, respectfully submitted that petitioner's First Amendment claim should be disallowed.

POINT IX

Petitioner's contention that the trial prosecutor erred in referring to his inculpatory recorded telephone conversations as confessions is a mere terminological quibble and does not present a meritorious claim of constitutional proportions.

In Point V of his Brief, petitioner assigns as error the trial prosecutor's reference to the wiretapped conversations as confessions. (Presumably it was not this insubstantial question which prompted this Court to grant certiorari). Petitioner seeks to exalt a minor terminological quibble into a constitutional issue. In this endeavor, he should not succeed. The fact is that the statements made by petitioner in these two conversations were damning indications of guilt, as this Court will readily perceive when it examines the record herein. These statements were a confession in practical fact, if not in strict legalistic contemplation. They would have convinced any observer with doubts that petitioner was guilty as effectively as any confession would. They conclusively showed that he was a criminal participant in the scheme of extortion.

The trial prosecutor said at one point that if Kaiser had said these things to a policeman, it would have amounted to a confession of guilt and the jury must be assumed to have understood from this that the statements were not technically within the legalistic definition of a confession because they were not made to an official. Such an insignificant departure from linguistic perfection hardly diminishes the impressive evidentiary force of these recorded conversations. Thus it cannot be said that, by referring to them as confessions, the prosecutor changed their content or made more of them than their demonstrative quality warranted, and it follows that these fugitive references cannot be said to have prejudiced substantial rights of petitioner.

Furthermore, the prosecutor's remarks were not evidence or binding characterizations and the jury was so instructed. The jury heard the conversations, and, having been instructed by the Judge as to its exclusive power concerning the determination of fact, was in a position to decide whether the conversations in question were inculpatory. In determining that point, it would certainly not have been influenced by nice legalistic questions as to how the conversations should be described in technical legal terminology. Whatever legalistic category the conversations were classifiable under, they either were or were not inculpatory. In fact, they were overwhelmingly inculpatory, and it is hard to imagine how a prosecutor, by describing them in the way any layman would have described them, could have added to the impression which they made upon the jury.

Indeed, there would be no constitutional obstacle to a state procedural rule formally characterizing such inculpatory statements as admissions or confessions. Such a rule would merely record the counsels of common sense and thus would not be so irrational as to offend the minimum standard of due process. And it is well established that a State may select its own forms of procedure (*Spencer* v. *Texas,* 384 U.S. 554). If a State may accomplish such a result by formal rule, there is no reason why it cannot achieve the same objective informally through the statements of the prosecutor. That the prosecutor's reference may or may not have been technically correct under a prevailing state law definition, is not a matter for a federal constitutional court to pass upon.

In *Spencer* v. *Texas* (384 U.S. 554), this Court refused to strike down a State conviction which was based upon a procedure under which the trial jury was fully informed, through allegations in the indictment and the introduction of proof, of petitioner's previous crimes for the purpose of enhancing punishment in the event of conviction in accordance with the State's multiple offender statute. It is plain that the admission of such proof of other crimes may seriously prejudice defendant, despite limiting instructions, and yet this Court, rightly, it is submitted, did not believe that the disadvantages entailed in this procedure were of constitutional status. If the dangers inherent in the *Texas* procedure did not justify the invocation of this Court's majestic authority, it is plain that the trivial divergence from semantic nicety exhibited in this record can not properly activate its corrective processes.

This Court held in *Spencer* that a state procedure does not run afoul of the Fourteenth Amendment because another method may seem to the Court to be fairer or wiser or to give a surer promise of protection to the prisoner at bar. The Court declared that a state is free to regulate its own criminal procedure and that only those procedures which fall below the minimum level will suffer the sanction of its disapproval. The holding in *Spencer* is but the latest pronouncement in a well-defined current of authority. (See Cole v. Arkansas, 338 US 476; *Lanzotta* v. *New Jersey,* 305 US 357; *Kay* v. *United States,* 303 US 1).

Does the petitioner seriously argue that the case would be fundamentally different in its constitutional significance if the Assistant District Attorney, instead of using the convenient world "confession", employed some such unwieldly phrase as "statement of facts which, if given to a police officer, would have constituted a confession of guilt", or some other burdensome structure of rhetoric? On any showing, it can scarcely be argued with reason that the difference between these two phraseological modes is so substantial as to require the corrective intervention of the highest court in the land. To argue that a comparative exegesis of these forms of reference discloses substantial gradations of rhetorical significance is to found constitutional rights upon discriminations too subtle for the governance of a system of constitutional redress which takes the brute textures of social fact as the underpinning of decision and the realm of gross events as the theater of its operations. Fundamental law is the ordering instrument of a mundane society, not the vindicator of exquisite niceties. This majestic judicial body does not exist to decide questions of gossamer substance.

Can it seriously be urged that the difference in the alternative strategies of description just discussed is of such import that the awesome powers of our high constitutional court may be invoked to decide between them. The fact is that whichever form of characterization is used is a matter of constitutional indifference. The use of the descriptive term "confession" in these circumstances may be condemned only on the assumption that constitutional review entails the most refined judgments of procedural wisdom.

The due process clause of the Fourteenth Amendment was not designed to enforce upon the States federal intuitions of procedural policy or to fasten upon its processes of criminal justice procedural minutiae which are justifiiable in terms of administrative preference rather than fundamental fairness. (See *Hoag* v. *New Jersey,* 356 U. S. 464) A constitutional court will not impose its contravening authority unless the procedure falls below the minimum standard of civilized practice. (See *McNabb* v. *United States,* 318 U.S. 332, 340), on pain of being judged to have invaded those residual powers of State government preserved inviolate against the intrusion of national authority by the very constitutional scheme which sustains the legitimacy of that authority.

The due process clause, enacting a minimum standard, reaches only that official conduct which shocks the civilized sense of justice. (See *Palko* v. *Connecticut,* 302 U.S. 319, 82 L. ed. 288).

It is not the guarantor of procedural prefection, nor does it enthrone luxurious refinements as the determinants of constitutional propriety. (See *Chicago Life Insurance Co.* v. *Cherry,* 244 U.S. 25, 30).

The difference between the description used and the sort of descriptive reference which would presumably satisfy the petitioner's instinct for puristic nuances would not be sufficient to be characterized as one of constitutional dimension.

POINT X

Petitioner's anti-wiretap philosophy is offensive to the canons of empirical inquiry and analytical reason and exhibits the intellectual vice of the partial view.

On Pages 46 through 48 of his Brief, petitioner sets forth a polemical dissertation on the general evils of wiretapping. He argues that "While having in a very real sense increased the freedom of the individual, the telephone has brought with it a host of new threats to that freedom. Individuals, living in a society which is structured upon face-to-face personal communication, were easily able to make adequate provision for the privacy of such communication. A society which has, however, been structured upon the use of the telephone, has made individual relationships susceptible to the undesired presence of third parties . . . our telephone structured society operates, for the most part, upon the assumption that no one is listening in."

In response, it may be observed that it would not be true to say that persons involved in face-to-face personal communication are "easily able to make adequate provision for the privacy of such communication" in view of the development of advanced eavesdropping devices, long range cameras and other investigative instruments. Non-electronic eavesdropping and physical surveillance of face-to-face personal contacts were always possible and very often effective, even in those earlier stages of social life in which modern electronic detecting devices were unknown.

The trend of petitioner's philosophical critique on wiretapping is toward the conclusion that all compromise of the principle of telephonic secrecy is objectionable. He would preserve inviolate against all competing claims, no matter how weighty, the ideal of telephonic privacy. Petitioner fails to grasp that central principle of the politically organized society which insists that freedom is not an absolute, that it must be distributed in those special patterns which conduce to the benefit of society as a whole. He fails to perceive that no form of liberty may be exercised to the point where it encroaches unacceptably upon the rights and liberties of others or shall be exempt from that reasonably conducted inspection of its exercise by the agents of society, necessary to ensure that it does not offend against the basic interests of society.

The President's Commission on Law Enforcement and the Administration of Justice has found that the telephone is an indispensable weapon in the arsenal of organized crime. (The Challenge of Crime in a Free Society, p. 201.) *The only effective weapon against such illegal use of the telephone is court-approved official wiretapping.*

If the telephonic medium of expression be totally excused from official surveillance, it follows that the leaders of organized crime may continue to use this indispensable instrument of wrongdoing to invade the privacy and suppress the rights of law-abiding citizens. The approach commended by petitioner would immunize the telephonic medium from all social control and would permit criminal forces to preempt a whole technology for their unimpeded use. One might as well argue that all gun control legislation is philosophically unacceptable as an infringement on the values underlying the Second Amendment.

Petitioner's thesis is radical. It is nothing less than this: that there is an instrument of social life so unique in its character and so superior in its status as to be exempt from those normal processes of social regulation to which all the other acts and agencies of social life are subject. Petitioner seems to contend, by implication, that the function of government is irrelevant to the medium of telephonic communication and that such area of activity marks out a distinct enclave of private sovereignty beyond the reach of government. This is a formula for selective anarchy. Its accepance is totally inconsistent with the fundamental postulate of democratic theory that all private power is subject to the control of the sovereign people so that private energies may be made responsible to those overarching goals sustained by the consent of the governed.

Petitioner also argues that telephonic interception is, by its nature, indiscriminate. As Respondent has indicated in another part of its Brief, the same charge may be brought against the traditional search and seizure, as well as the evidentiary procedure of the Subpoena Duces Tecum.

Moreover, there has never been a single reported instance of which the briefer is aware where it was even alleged that a police officer had employed for an improper purpose or for personal gain information which he learned from wiretapping. Thus the fact that conversations, other than those of a criminal character may also be heard during the course of a wiretap interception does not disqualify this valuable investigative device from acceptance.

Petitioner also raises the dread spectre of official abuse and the possibility of forged or altered tape recordings of telephonic interceptions. He also suggests that the recordation of telephonic interceptions is subject to error owing to the possibility of defects in the recording machine. It may be said in response that all official power is capable of abuse and that there is the possibility of corruption inherent in virtually every mode of governmental action. To deduce the illegitimacy of power from the possibility of its abuse is to condemn all government to impotence. There is virtually no investigative technique which is not susceptible of error (e.g. the fallibility of the eye witness identification is notorious), and an ideal of practice which insists upon certain reliability is not suited to the realm of human affairs. So far as abuse is concerned, the General Commentary to the American Bar Association Draft on Electronic Surveillance indicates that "there had been no documented instances of cases in which tapes had been forged." (p. 93). The Commentary further declares:

> "Some police are, of course, willing to commit perjury, but note that to forge tapes it would require a number of individuals, some of whom would have to be relatively highly skilled technicians. All of those involved in the overhear and subsequent custody of the tapes would have to be ready to undergo cross examination. The likelihood of this abuse occurring is not so great that no use whatsoever of

> tapes should be made. If anything, the increased use of tapes could be expected to raise not lower the quality of evidence in the criminal trial." (page 94)

The Commentary's conclusion in this regard seems well-founded.

Also, it should be noted that forging of tapes is often detectable by expert examination, but petitioner did not, at any stage of this case, seek a hearing to inquire fully into any alleged forgery or make a motion that the tapes in question be subjected to expert analysis. It would appear that petitioner raises this point in an academic spirit and does not offer it as an issue in this case.

It should also be pointed out that the possibility of abuse is perhaps greater with regard to other types of evidence. Witnesses in criminal trials may and do perjure themselves, either out of bias, fear of reprisal or considerations of financial gain.

The wide-spread intimidation and bribing of witnesses which is a staple feature of the organized crime context and the questionable reliability of some accomplice and informer testimony has led some experts to conclude that the use of wiretaps raises the quality of evidence in criminal trials and ensures fairer trials (Standards Relating to Electronics Surveillance, American Bar Association Project, *supra*, pp. 95-96).

Petitioner expresses concern over the possibility of official abuses, such as the re-editing of tape recordings of telephonic interceptions, but every evidentiary device carries with it the possibility of abuse. A policeman who would forge a tape recording might also be willing to perjure himself in the giving of testimonial evidence. This is certainly no argument for barring the testimony of police witnesses. There is inherent in every search and seizure situation the possibility that the searching officers may plant incriminating evidence upon the searched premises, but this is not a valid reason for outlawing official searches. (Of course, such abuses, like other official abuses, rarely occur.)

Petitioner also poses an alleged danger to First Amendment rights stemming from a pervasive regime of official wiretapping. In the portion of this Brief dealing with the constitutional aspects of the First Amendment issue raised by petitioner, this subject is dealt with in detail. However, it should be pointed out that the fear of pervasive and intensive official electronic surveillance is groundless. In this connection, Professor G. Robert Blakey in the General Commentary to the American Bar Association's Draft on Electronic Surveillance (pp. 45-48) declares:

> "Less widespread publicity has been given, however, to the physical limitations in the existing devices or to the inherent investigative limitations on the use of these techniques."

After discussing these physical and practical limitations on the use of electronic surveillance devices in detail, Professor Blakey declares:

> "Contrary to popular misconception, they are not a 'lazy' way to conduct an investigation.[122] Monitoring surveillance equipment in certain situations requires an inordinate amount of time, hours and hours spent without a word overheard, simply because no one is present and speaking. While automatic recording equipment is available, key devices still require a human monitor.[123] Seldom is it possible for him to be alone. Others have to be available to act immediately on intercepted information. It may be necessary, for example, to place in motion a physical tail or to place a key meeting under physical surveillance, the location of which has just become known. This may require the constant attention of several men and cars to be tied up. All of this takes precious manpower, yet most of the time of the men is spent waiting. Only an important investigation can warrant the use of police personnel, equipment and other

resources in this fashion. Idle curiosity, of course, never will warrant such use. Analysis of the product, too, is painstaking. Voices and overheard names must be identified, and this demands time and talent. Meaning sometimes must be derived from the partial interception of a series of conversations when only one or two take place within the range of the device. Usually, the level of pre-surveillance information is such that the expected information, when it is intercepted, is intelligible, but this, in itself, normally means that extensive investigation must precede the use of these techniques. This, too, limits their use. The notion that the use of these techniques is thus a 'short cut' designed to save 'shoe leather' is mistaken.

Thus, even if there were no legal restraints on the use of these techniques, they could nevertheless be used profitably in only a limited number of investigative situations. For example, between 1950 and 1959, the Office of the District Attorney of New York County, where electronic surveillance techniques have been vigorously employed, handled 343,745 criminal matters, yet wiretaps were installed in only 219 investigations and only 727 wiretap orders, including renewals, were obtained. This pattern of limited, but vigorous, use has been the same in recent years.

* * * *

What seems clear, moreover, is that they offer promise of help to the detective function usually only where multi-party criminal activity extends over a relatively long period of time. Otherwise, there are no communications to intercept. Solitary criminals seldom converse with others about past criminal behavior, and when they do, there is little way to predict beforehand when, how or where. Some geographical separation also is required before recourse to the phone becomes a necessity in running a criminal enterprise. This tends to limit productive tapping to large scale activities, for generally criminals will prefer to meet face to face to hold important conversations. It is practically impossible, moreover, to place isolated meetings under electronic

> surveillance. This means that bugging itself tends to be effective only after a pattern of meetings has been established over a period of time. Apart from legal or scientific limitations, in short, the practical limitations tend to restrict the use of electronic surveillance techniques to those situations where they are, in fact, the least objectionable as well as the most needed. From a legitimate law enforcement previewpoint, most criminal investigative situations present circumstances in which normal investigative techniques are both the preferred way and the best practice. Good practice and good law in this area thus tend generally to converge independently of one another."

Petitioner argues that unknown eavesdropping is objectionable because the conversant is unaware of it. However, this Court in *Katz* found such unawareness constitutionally tolerable (See 19 L. ed. 2d 584, n.16).

When one considers the extent to which organized crime has relied upon the telephone in developing highly efficient, coordinated operations, it becomes clear that, in the wrong hands, a telephone may be more damaging than a gun and that its supervision is justified on the same grounds which justify public regulation of other dangerous instruments. It is surely unsound to urge that criminal activities which are subject to control in other circumstances should be clothed with a magical immunity if only they are done in a telephonic context.

In conspiracy and gambling offenses, words are the means of committing the crime. The telephone is often used to utter these words, and only by the use of official wiretapping can such telephonic criminality be brought within the control of the penal law. Wiretapping also provides important evidence in many cases involving blackmail, bribery, official corruption and extortion, since, in such situations, as well, verbal language is often the agency of wrongdoing.

If the telephone is made a privileged sanctuary, then criminals will obtain complete immunity by taking care to commit such crimes only over the telephone.

The view that there is no right to privacy in a public place has received the sanction of this Court's acceptance. In 1952, the Court held that the playing of music and radio programs in vehicles of public transit and thereby converting passengers into a captive audience did not violate any right of privacy imbedded in our Constitutional tradition (*Public Utilities Commission of the District of Columbia* v. *Pollak*, 343 U.S. 451). A public telephone line might be considered in some sense a public instrumentality and the standpoint expressed in the *Pollak* case may, by legitimate analogy, serve to illuminate the interests at stake whenever an unlimited right of privacy is claimed as an inherent attribute of free citizenship.

Perhaps we should re-examine our thinking about the telephone system and recognize its aspects as a public instrumentality, with which it bears greater analogy than it does with private contexts. A whole mystique has grown up around that rather mundane instrument—the telephone—investing it with an almost sacred aura. But it is difficult to see why the telephone wire should enjoy a privileged status denied to other instrumentalities of social life—indeed why it should be clothed with greater sanctity than a man's home and hearth. If one's home may be invaded by a lawful search and seizure or the sanctity of the residence disrupted by itinerant religious evangelists (*Martin* v. *Struthers*, 319 U.S. 141) it seems untenable either logically or empirically to argue that telephone wires, which, like the telegraph and transportation systems, are public in character, should remain inviolate.

Moreover, modern organized crime makes effective use of electronic eavesdropping devices and other equipment provided by a sophisticated technology. Law enforcement must have access to these same devices if it is to conduct the struggle with lawless elements on reasonably commensurate terms.

In this period of expanded federal power, it is important that the states be kept vigorous centers of activity. They can hardly remain so if they are forbidden to exercise their police power with sufficient effectiveness to root out forces which would corrupt the vitality of state government and social institutions.

It is significant that in liberty loving countries like Canada and Great Britain, where the tradition of the inviolability of home and hearth has received its fullest realization, the police are permitted to wiretap. In Great Britain each tap must be authorized in advance by the Home Office. In 1957, a committee of the Privy Council issued a report recommending the continuance of wiretapping as "an effective weapon in law enforcement." The report stated, "The interference with the privacy of the ordinary, law-abiding citizen or with his individual liberty is infinitesimal and only arises as an inevitable incident of intercepting the communications of some wrongdoer. It has produced no harmful consequences."

A significant percentage of the most important criminal convictions in New York State in recent years has been based upon wiretap evidence. Without it, many hardened thugs and dangerous enemies of society would be wandering the streets instead of reposing safely in jail, as they now are.

In this connection, New York County District Attorney Frank Hogan has declared that electronic surveillance ". . . is the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles

"Lucky" Luciano, Jimmy Hines, Louis "Lepke" Buchalter, Jacob "Gurrah" Shapiro, Joseph "Socks" Lanza, George Scalise, Frank Erickson, John "Dio" Dioguardi and Frank Carbo * * *" (The Challenge of Crime In a Free Society, the report of the President's Commission on Law Enforcement and Administration of Justice, page 201).

It should also be noted that electronic surveillance has been an indispensable aid in cases involving our national security.

In the briefer's jurisdiction of Nassau County, wiretapping has enabled law enforcement authorities to learn of planned illegality in advance and to avoid serious crimes of violence that would not have been prevented otherwise.

So far as crime prevention is concerned, it should be realized that when a dangerous habitual criminal is imprisoned through the agency of wiretapping who would otherwise not have been brought to justice, wiretapping has prevented the many crimes he would have committed if at large during those years of imprisonment. Thus even where wiretapping does not prevent the crime with reference to which it was employed, it may still have significant value as a preventive force.

Most of our citizens in jurisdictions permitting official wiretapping and electronic surveillance obviously feel that if such investigative devices save only a few innocent people from being brutally murdered or victimized, it is well worth the limited invasion of telephonic privacy which is thus entailed.

In those situations where the telephone conversations of innocent people are intercepted, they are never publicized, since they are not offered as trial evidence. Indeed, they are never heard except by a few officers, who forget such irrelevant and unhelpful communications as soon as they have listened to them.

On every adjudicative occasion when it must be decided whether to recognize a particular social interest as a legal right, the exact nature of all of the interests involved in the context of decision must be assessed to determine whether, on balance, society would be well served by the grant of jural status to the interest presented for legal recognition.

It must first be noted that telephonic privacy is a low order of privacy, because it is not the sort of privacy needed to nurture creativity or ensure psychic health. Thus even if it were constitutionally protected, it would rank low on the scale of constitutional values, and would weigh less heavily than other privacy values when balanced against the interest of law-abiding citizens in preventing criminals from invading their privacy. Such criminal invasions are often accomplished in such a way as to leave psychic scars and emotional tensions which prevent their victims from making effective use of privacy in the future.

The interest in telephonic privacy as against official eavesdropping of the sort here involved (i.e., wiretapping which is conditioned by a statutory provision, such as that in 813-a, on a showing of reasonable ground to believe that evidence of crime may be obtained from conducting the prospective wiretap) is not an interest shared by every member of society. Under a "reasonable ground" test (and indeed even without it) the factual probabilities are that most members of society will never be subjected to official eavesdropping and that those few law abiding citizens who are subjected to it will never experience such an invasion more than once in a lifetime.

These are the realities of which this Court may take judicial notice (*Brown* v. *Board of Education, supra; Dennis* v. *United States, supra*). That such notice is appropriate may be seen from the discussion in this Point and in Point VIII of this Brief, in which is shown the infrequency of wiretapping in New York County under the regime of control ordained in 813-a. The practical limitations on electronic surveillance described earlier in this Point also confirm the propriety of such notice.

Thus the interests infringed by such a regime of wiretapping are mostly those of criminals and those associated with them. As against those limited interests, there must be balanced the interests of criminals in being caught and exposed so they may be rehabilitated and achieve self-respect, the interest of our citizenry in preventing criminal corruption and control of our economic, social and political life and criminal infliction of physical injury and property damage which might be avoided by official wiretapping.

When the interests of those who are undeserving by the standards of our social ethos are thus balanced against the interests of law abiding citizens, it is obvious which should receive judicial preferment, even in the absence of the exact empirical data which would permit quantitative rendering of the interests on the opposing scales. This view is corroborated by the realization that invasion of privacy by wiretapping is subtle and painless. Criminal invasion of privacy is harsh and painful.

Of course, it is the part of sophistication to observe that where quantification has done all that can be done to expose the dimensions of the interests at stake, the balancing process is in its nature still qualitative and ineffable. Value judgment is implacably resistant to metricization. It is not performable by a mechanical strategy of quantitative judgment. Thus precise empirical data would not be likely to change the public's obvious view that, whatever the numerical values of the interests confronting each other, the investigative device of wiretapping should be approved. The people of the State of New York, acting in constitutional convention and through their legislators, and the citizens of the United States, acting through the Congress which enacted the Safe Streets Act, have recorded their judgment in favor of official wiretapping. There is nothing in the language of the Constitution which signifies the illegitimacy of the balance they have struck or mitigates against the exercise of the power of the people, the source of all governmental power, judicial as well as legislative, to maintain democratic control over the ends of society and the conditions of the common life.

If constitutional adjudication should outlaw wiretapping, the price of this decision may be prohibitive, for what is asked by the advocates of wiretapping is not merely the means for containing minor transgressions, but rather the weapons needed in a mortal struggle with relentless adversaries so vast in their power and so evil in their designs that their continued existence poses a mortal threat to the integrity and stability of democratic government. Can it seriously be maintained that a public interest so urgent and over-riding does not justify the relatively small abridgement of private interests which court-controlled official wiretapping entails? To argue thus is to press the ideal of absolute freedom to a limit so extreme as to jeopardize those foundations of social order without which *all* liberties will be placed in deadly peril.

The insistence on absolute privacy at all costs is the product of an outlook more concerned with conceptual symmetry than concrete facts and practical dangers, the fruits of a methodology which abstracts but one element of a total situation and exalts it to the status of an Article of Faith, whatever mischief may be done in the process.

The philosophy of absolute privacy, like other absolutisms, provides an illusion of certainty in a complex and uncertain world. But it is founded upon a spurious methodology.

The mode of doctrinaire absolutism is really a way of doing without a strategy of policy formation. It amounts to nothing more than the transaction of complex and dangerous social questions by a method as inflexible, as simplistic and as limited in its adaptability to special circumstances as instinctual behavior. It is respectfully submitted that the Court should not confer upon this retrograde ideology the majestic sanction of its favor.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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